Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

GERALD GARNER and JOAN GARNER,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") sanction an error by the district court in finding that the district court had the power and authority to grant the subject preliminary injunction absent allegations of fraud, fraudulent conveyance, or criminal conduct, in that the Ninth Circuit's decision was in conflict with the decisions of other appellate courts?

2. Even if the district court had the power and authority to grant such an injunction, did the lower courts err in granting the injunction in this particular case, in that the injunction was unconstitutional, overbroad and punitive as applied to Gerald and Joan Garner?

LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

The parties to this action are the plaintiff, the Federal Deposit Insurance Corporation, in its capacity as Receiver of American Commerce National Bank, and the defendants, certain former directors and one former officer of American Commerce National Bank: Gerald Garner; Joan Garner; Eugene Alterman; Norman Charney; Galal Gough; Roberta Helsing, as administratrix of the Estate of Duffern Helsing; Judy Mandel; and Daniel Garner. Certain defendants have filed cross-claims against other defendants.

As all of the parties are either federal agencies or individual defendants, there are no parent companies and/or nonwholly owned subsidiaries required to be disclosed by Rule 29.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI

Defendants, appellants and petitioners Gerald Garner and Joan Garner, who are husband and wife (hereafter "the Garners"), respectfully petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit (hereafter "Ninth Circuit") filed and entered on September 11, 1997 ("the Ninth Circuit Order"), in the matter known as *Federal Deposit Insurance Corporation v. Garner et al.*, United States District Court for the Central District of California, Case No. CV 96-2668 GHK (ANx).

OPINIONS BELOW AND CITATIONS THERETO

On September 11, 1997, the Ninth Circuit issued the Ninth Circuit Order, which is published at 125 F.3d 1272 (9th Cir. 1997), affirming the district court's issuance of a preliminary injunction on December 3, 1996 (the "Preliminary Injunction") freezing all of the assets of the Garners and alleged "related interests" (as determined ex parte by the district court) and requiring the Garners to turn over all of their assets to a trustee. (Excerpt of Record Document (hereafter "Exc.") 122, Clerk's Record Document ("CR") 122.) (The alleged "related interests" are corporations and irrevocable trusts which have spendthrift provisions, including some in which neither of the Garners is a trustee, beneficiary, or holder of any life estate.) The Ninth Circuit Order and the Preliminary Injunction are reproduced in the attached appendix, beginning at App. 1a. No rehearing was sought of the Ninth Circuit Order.

BASIS FOR JURISDICTION IN THIS COURT PURSUANT TO RULE 14(1)(e)

The Ninth Circuit Order was filed and entered on September 11, 1997, and this petition is therefore timely. As stated above, no rehearing was sought. No extension of time to file this petition has been requested. This Court has jurisdiction to review the Ninth Circuit Order under 28 U.S.C. §§ 1254(1) and 2101(c). Subsections (iii) and (v) of Rule 14(1)(e) are inapplicable to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved in this case. The statutory provisions involved are 12 U.S.C. § 1821(d), subsections (17), (18), and (19), and Rule 65 of the Federal Rules of Civil Procedure. These statutes and rules are reproduced in the appendix.

STATEMENT OF THE CASE

A. The Nature of the Case

This action was filed on April 1, 1996 by the Federal Deposit Insurance Corporation ("FDIC") as receiver for American Commerce National Bank ("the Bank") against certain former directors and one officer of the Bank for alleged negligence, gross negligence, breach of fiduciary duty, lending limit violations, and legal malpractice (as to one former director not involved in this appeal), pursuant to 12 U.S.C. §§ 1811 et seq.; 12 U.S.C. § 1819(b)(1), (2)(A);

and 28 U.S.C. §§ 1331 and 1345. (Exc. 1, ¶ 1, CR 1, ¶ 1.) Defendant Gerald Garner is the former Chairman of the Board of the Bank; defendant Joan Garner, his wife, is a former director of the Bank. The Bank, though solvent with satisfactory capital, was closed by the Office of the Comptroller of the Currency ("OCC") on April 30, 1993, and the FDIC thereafter assumed certain assets and liabilities of the Bank as receiver. (Exc. 1, ¶ 7, CR 1, ¶ 7.) The Bank was in existence from 1984 to 1993. This action was not brought until almost three years had elapsed after the seizure of the Bank, after the OCC had brought an administrative proceeding which was settled at the OCC's request before the defense started its case. Presumably the FDIC was privy to the evidence adduced and defenses raised at the administrative proceeding, as FDIC representatives were in attendance at the hearing from time to time. Defendants herein vigorously contest the circumstances of the seizure of the Bank and contend that the Bank was closed wrongfully, without justification, in violation of due process, and without any meaningful hearing on the merits, and that the closure was based on religious animus and falsification of the administrative record. (Exc. 39, CR 39.)

The Complaint herein does not allege any fraudulent or criminal conduct or fraudulent conveyances, despite the FDIC's three-year investigation and the prior OCC proceeding. It stands to reason that if the prior proceedings had disclosed any evidence of fraud or criminal activity, such evidence would have become part of this late-blooming lawsuit. The only relief sought by the FDIC is monetary damages; no injunctive relief or other equitable relief is requested. The amount of damages sought is

believed to be about $12-13 million, of which only a small portion consists of monies alleged to have been received by any of the defendants (as compensation, expense reimbursements, or loan proceeds); most of the damages sought relate to loans to third parties which the defendants are alleged to have improperly approved. (Exc. 1, CR 1.) All of the purported claims asserted against the defendants deal with alleged acts or omissions purportedly committed prior to April 30, 1993. (Exc. 1, CR 1.) Indeed, none of the defendants has been engaged in the banking industry since that date. The FDIC has to date refused to produce to the defendants a complete accounting of the affairs of the Bank since the date of the seizure.

The central issue before the Court here is whether the district court had the power and authority to grant the Preliminary Injunction absent any allegations of fraud or criminal conduct against the Garners. The Ninth Circuit Order appears to have been the first and only order issued by any court holding that the statutes at issue in this case permit the granting of such an injunction even without such allegations, in a case which merely involves alleged negligent activity. Other courts of appeals and lower courts have held to the contrary, and the Ninth Circuit Order has therefore created a conflict among the circuits which requires resolution by this Court. Moreover, even if the district court had the authority to issue the Preliminary Injunction, it should not have issued such a punitive and overbroad order, which denies due process to the Garners by virtue of its overbreadth.

B. The Course of Proceedings and Disposition in the District Court

On July 22, 1996, four months after the case was filed, the FDIC apparently filed an ex parte application under seal seeking a temporary restraining order and order to show cause why a preliminary injunction should not issue to freeze all of the Garners' assets and appoint a trustee over those assets during the pendency of the lawsuit. (Exc. 37, CR 37.) (The Garners received no notice of this ex parte application, or in fact of any of the following applications, until October 31, 1996.) The district court, the Hon. George H. King, denied the application on July 26, 1996, stating that the court had found no substantive basis for the issuance of such an order, but inviting the FDIC to submit further briefing. (Exc. 37, CR 37.)

On or about August 7, 1996, the FDIC submitted further briefing and applied again under seal and again without notice to the Garners for a temporary restraining order and order to show cause. Again, the district court denied the application on August 15, 1996 but invited further briefing. (Exc. 50, CR 50.)

On both of these occasions, the district court issued extensive orders, under seal and ex parte, setting forth its reasoning in detail. (Exc. 37, CR 37; Exc. 50, CR 50.) On both occasions, the court found that the FDIC had shown an insufficient basis for the requested relief, and the court stated that its own research had not found a basis for the requested relief. *Ibid.* Indeed, the court's second ruling, after the court had had additional time to consider the matter, was even more negative than the first. *Ibid.*

On August 26, 1996, the FDIC submitted additional briefing. Two months later, on October 29, 1996, the district court granted a temporary restraining order and order to show cause, with no explanation of its reasoning or the basis for the reversal of its earlier decisions. (Exc. 74, CR 74.)

The specific issue before the court in these applications was whether the court had the authority, at the FDIC's request, to freeze all of the assets of the Garners during the pendency of this lawsuit and to install a trustee to maintain and invest those assets and monitor future spending, including such private matters as what debts the Garners could pay and what cars they could drive. The freeze was intended as nothing less than a forfeiture, designed to punish the Garners; it included assets which could not be traced to the Bank, such as Gerald Garner's income from his current employer Coast Plaza Doctors Hospital and Joan Garner's wedding ring, which predated by 20 years any affiliation with the Bank. It also extended to corporations in which the Garners had no stock interest (and no proof was proffered that they did), and to trusts established between 1976 and 1980, before the Bank was in existence, which were irrevocable regardless of any interest of the Garners. All of this was requested in a lawsuit filed three years after the closing of the Bank which does not even allege fraud or criminal activity.

The FDIC asserted that two separate lines of authority supported the issuance of the requested order: (1) 12 U.S.C. § 1821(d), subsections 18 and 19 (hereafter "Sections 18 and 19"), statutes which had been added to the Federal Deposit Insurance Act by the Comprehensive

Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (hereafter "Taxpayer Recovery Act" or "TRA"), enacted as part of the Crime Control Act of 1990, P.L. 101-647, 104 Stat. 4789 (1990); (2) second, and in the alternative, the FDIC contended that the FDIC's request should be granted pursuant to *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) ("the *Sahni* case").

Section 18 provides in pertinent part as follows:

> Subject to paragraph (19), any court of competent jurisdiction may, at the request of –
>
> (A) the [FDIC] in the [FDIC's] capacity as . . . receiver for any insured depository institution . . .
>
> . . . .
>
> issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the [FDIC] . . . under the control of the court and appointing a trustee to hold such assets.

Section 19 provides in pertinent part as follows:

> (A) Showing
>
> Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss or damage is irreparable and immediate.

The district court ruled, in response to both the July and August 1996 ex parte applications, that neither line of authority justified the draconian nature of the relief

sought. In addition, the district court ruled in response to both of those applications that Sections 18 and 19 did not apply in the absence of allegations of fraud or fraudulent conduct. (Exc. 37, CR 37, pp. 2-3; Exc. 50, CR 50, pp. 3-6.)

As indicated above, the court reversed itself with no explanation on October 29, 1996. The order to show cause came on for hearing on November 20, 1996. At the hearing, the court stated that it had done further research on the legislative history of Sections 18 and 19, that those statutes permitted a freezing of assets and the appointment of a trustee in the court's discretion even absent allegations of fraud, and that a prior district court case which had analyzed in painstaking detail an identical request from the FDIC (*FDIC v. Floyd*, 827 F. Supp. 409, 412-414 (N.D. Tex. 1993) ("*Floyd*")) had been wrongly decided (even though the FDIC judicially admitted at the hearing that Floyd was "on all fours" with the instant case. (Reporter's Transcript ("R.T."), Exc. H, p. 6, lines 24-25.) The district court ruled that an injunction would issue. (R.T., Exc. H, p. 49.)

The court issued the Preliminary Injunction on December 3, 1996. (Exc. 122, CR 122.) The Garners had no meaningful opportunity to contribute to the wording of the Preliminary Injunction, as the court signed the document submitted by the FDIC without substantial change. None of the defendants in the case other than the Garners are subject to the Preliminary Injunction.

Under the Preliminary Injunction, the Garners were required to turn over their assets to the trustee on December 10, 1996. (Exc. 122, CR 122.) On that day, the Garners filed a voluntary petition in bankruptcy under Chapter 11

of the Bankruptcy Code in the United States Bankruptcy Court, Central District of California, known as *In re Gerald J. and Joan G. Garner,* Case No. SA 96-24671-JW. Although a Chapter 11 trustee was subsequently appointed, the district court modified the Chapter 11 automatic stay to permit the Garners to prosecute this appeal in light of the substantial legal questions presented.

C. Disposition in the Ninth Circuit

This case was timely appealed to the Ninth Circuit on December 5, 1996. On September 11, 1997, the Ninth Circuit issued the Ninth Circuit Order attached hereto at App. 1a. In affirming the granting of the Preliminary Injunction, the Ninth Circuit relied exclusively on Sections 18 and 19, and did not address the *Sahni* case (which, accordingly, is not addressed in this petition). The Ninth Circuit ruled that Sections 18 and 19 on their face authorized the granting of a preliminary injunction without allegations of fraudulent conduct. The Ninth Circuit also ruled that the facts met the standards for the issuance of a preliminary injunction, and that the Preliminary Injunction as drafted was neither unconstitutional nor overbroad. The Garners contest this ruling.

D. The Basis for Jurisdiction in the Lower Courts

Jurisdiction in the district court was properly based on 12 U.S.C. § 1811 et seq., 12 U.S.C. § 1819(b)(1), (2)(A), and 28 U.S.C. §§ 1331 and 1345, in that actions to which the FDIC is a party are deemed to arise under the laws of

the United States. Jurisdiction in the Ninth Circuit was properly based on 28 U.S.C. § 1292(a)(1).

REASONS FOR CERTIORARI

I. THE NINTH CIRCUIT ORDER IS ERRONEOUS AND IS IN CONFLICT WITH THE DECISIONS OF OTHER APPELLATE COURTS

The Ninth Circuit Order granting the Preliminary Injunction in the absence of allegations of fraud, fraudulent conveyances, or criminal conduct is in conflict with decisions of the First, Second, Fifth and Tenth Circuits, which have held that Sections 18 and 19 require allegations or proof of fraud or fraudulent conveyances, at the very least, before injunctive relief can be granted. Indeed, the Ninth Circuit Order was the first and only decision squarely holding that Sections 18 and 19 authorize the granting of a preliminary injunction even where such allegations are absent. This Court should grant certiorari to resolve this conflict between the appellate courts.

A. General Principles Regarding Preliminary Injunctive Relief

It is well established that Rule 65 of the Federal Rules of Civil Procedure merely provides the procedure for obtaining a preliminary injunction, but does not in and of itself provide a substantive basis for the issuance of such provisional relief. "The substantive basis and the jurisdictional authority for use of this procedure must be sought elsewhere." *Federal Trade Commission v. H. N. Singer, Inc.*,

668 F.2d 1107, 1109 (9th Cir. 1982); *Reebok International, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552, 558 (9th Cir. 1992). Thus, in order to obtain a preliminary injunction, the FDIC had to meet its burden of proving that it has a substantive basis for such relief. Moreover, the general federal rule is equally well established that, unless the standards for an attachment are met, a district court may not freeze a defendant's assets merely to preserve them to satisfy a potential money judgment. *In re Fredeman Litigation*, 843 F.2d 821, 824 (5th Cir. 1988); *Freese v. Federal Deposit Insurance Corp.*, 837 F. Supp. 22, 24 (D.N.H. 1993) ("Courts have routinely denied access to personal financial records in civil discovery reasoning that a party's ability to satisfy a judgment is irrelevant to the subject matter of the action. . . . [E]ven the broad powers of the FDIC do not extend to an invasion of privacy").

B. Decisions of Other Courts Would Not Have Permitted a Preliminary Injunction to Issue Here

None of the cases cited by the FDIC or the lower courts demonstrated a substantive basis for the issuance of injunctive relief in this case. The district court in its July 26, 1996 order correctly pointed out that the cases previously decided under Sections 18 and 19 either involved allegations of fraudulent transfers under 12 U.S.C. § 1821(d)(17) ("Section 17") or were cases in which fraud had already been proven. (Exc. 37, CR 37, p. 2.) Neither is the case here. Moreover, the district court judge conceded at the November 20, 1996 hearing that he was not able to find any cases where relief under Sections

18 and 19 had been granted but fraud was not alleged. (R.T., Exc. H, p. 8, lines 20-23.)

The Ninth Circuit and the district court both expressly rejected the reasoning of the *Floyd* case, which the FDIC conceded was "on all fours" with the instant case. In *Floyd*, unlike the instant case, the defendant was under criminal prosecution and had apparently sent some of his funds overseas to avoid seizure. Nevertheless, the *Floyd* court denied the request for a preliminary injunction, holding:

> In the decisions that have construed and applied 1821(d)(18)-(19), the underlying suit involved, at least in part, allegations of fraudulent conduct. In those cases, the complaining federal banking agency sought temporary restraint of assets in conjunction with its attempt to avoid allegedly fraudulent transfers under 12 U.S.C. § 1821(d)(17). [827 F. Supp. at 412.]
>
> . . . .
>
> The FDIC's interpretation of § 1821(d)(18)-(19) is deficient . . . because it requires no showing of fraudulent conduct associated with the underlying action. [*Id.* at 413.]
>
> . . . .
>
> This view is supported by the grouping of subsections (18) and (19) with subsection (17), which allows the FDIC to avoid fraudulent transfers. The common-sense approach is to read the three subsections as a package. The Fifth and Tenth Circuits have implicitly done so. . . . [*Ibid.*]
>
> . . . .

> The legislative history is revealing silent on any proposed application of subsections (18)-(19) in the absence of subsection (17). Instead, the legislative history provides generally: Subtitle B of the legislation, which is aimed at protecting assets from wrongful dissipation, expands the authority of [the FDIC] to enjoin the dissipation of assets wrongfully obtained [and] to void fraudulent transfers. . . . The clear intent of Congress in these subsections is to address fraudulent activity. [*Ibid.*]
>
> . . . .
>
> For the reasons given above, the Court concludes that a petition for preliminary injunction brought under 12 U.S.C. § 1821(d)(18)-(19) must include a showing of fraudulent conduct. **Otherwise, the statute operates to afford Draconian relief to the FDIC under everyday circumstances**. . . . [I]f the underlying lawsuit does not allege fraudulent activity, as in this case, a petition for preliminary injunction must show some potential injury evidenced by a clear nexus between past fraudulent conduct and the property for which restraint is sought under the facts of the underlying suit. [*Id.* at 414; citations omitted; emphasis added.]

As quoted above, *Floyd* stated that the Fifth and Tenth Circuits had already implicitly read Sections 17, 18 and 19 together "as a package." 827 F. Supp. at 413. The cases to which *Floyd* was referring were *FDIC v. Faulkner* ("*Faulkner*"), 991 F.2d 262 (5th Cir. 1993) and *Resolution Trust Corporation v. Cruce* ("*Cruce*"), 972 F.2d 1195 (10th Cir. 1992). These were the same cases of which the district court in the instant case said in its August 15, 1996 order,

"[T]wo circuit courts have expressly linked their application of the modified standard [permitting a preliminary injunction under Rule 65] to the presence of a subsection (17) fraudulent conveyance claim." (Exc. 50, CR 50, p. 4.)

Faulkner was decided only days before *Floyd*. In *Faulkner*, the FDIC moved for and was granted a preliminary injunction pursuant to Sections 18 and 19 against a real estate promoter's wife and children in an action alleging that the promoter had defrauded a savings and loan association through fraudulent real estate speculation schemes. The Fifth Circuit stated that Section 19 "altered the showing the FDIC must make to obtain a preliminary injunction" in actions "[t]o prevent the dissipation of assets **fraudulently obtained** from federally insured financial institutions." (991 F. 2d at 264 n.3; emphasis added.) This case thus held that a showing of fraudulent conduct must be made before a preliminary injunction will issue.

Cruce, which was decided the year before *Floyd*, was a fraudulent conveyance action for restitution. The Resolution Trust Corporation ("RTC") was granted a preliminary injunction freezing the assets of the wife of a principal director and officer of a failed savings and loan association and appointing a trustee. In granting the requested relief, the Tenth Circuit clearly treated Sections 17, 18 and 19 as a "package." The court stated, in pertinent part:

> We begin our analysis by looking to the language of the statute. The text of sections 1821(d)(17)-(19) evidences Congress' clear intent to augment the RTC's ability to avoid fraudulent conveyances or to freeze assets that may have

> been fraudulently conveyed by parties related to insured depository institutions. The legislative history of the Taxpayer Recovery Act further buttresses our reading of the statute: Subtitle B of the legislation, which is aimed at protecting assets from wrongful disposition, expands the authority of . . . conservators, receivers or liquidating agents . . . to enjoin the dissipation of assets wrongfully obtained . . . [and] to void fraudulent transfers. [972 F.2d at 1199.]

The Tenth Circuit in *Cruce* reviewed the legislative history and was satisfied that Sections 18 and 19 should not be applied in the absence of the factors referred to above.

In addition to the foregoing cases, the First and Second Circuits have also treated Sections 17-19 as a "package," such that Sections 18 and 19 could not be and were not applied without, at the very least, allegations of fraud. In *FDIC v. Elio*, 39 F.3d 1239 (1st Cir. 1994), an action alleging that certain transfers of assets were fraudulent, the trial court had issued a preliminary injunction granting an attachment and appointing a trustee. (39 F.3d at 1242.) The granting of the preliminary injunction was affirmed on appeal, as the trial court had found that the FDIC was reasonably likely to succeed in proving that the defendant had transferred assets to hinder, delay and defraud the FDIC. (39 F.3d at 1243.) The appellate court further stated: "Here, the validity of the attachment order is by no means separable from the merits of the FDIC's fraudulent conveyance claims . . . " (39 F.3d at 1249).

In the Second Circuit, in *In re Colonial Realty Company*, 980 F.2d 125 (2d Cir. 1992), the appellate court affirmed a district court decision which in turn had

affirmed an order of the bankruptcy court holding that a lawsuit by the FDIC to recover assets alleged to have been fraudulently conveyed by a bankruptcy debtor involved property of the bankruptcy estate and was therefore subject to the automatic stay. The Second Circuit rejected the FDIC's argument that Sections 17-19 exempted the FDIC from the operation of the automatic stay. What is significant about this case is that both the FDIC and the courts treated these statutes as a "package," to be construed together. In the instant case the FDIC has taken the opposite position. For another case in which the FDIC took the position that the three statutes were to be construed together, *see Hirsch v. FDIC*, 1994 WL 760662 (D. Conn.) at p. 6 ("In the view [of the FDIC respondents], the FDIC's actions in Florida 'were taken as part of a good faith effort to exercise brand new powers conferred upon [the FDIC] by Congress under 12 U.S.C. Section 1821(d)(17)-(19)' " (quoting from an FDIC brief). Now, when it suits the FDIC, the FDIC has contradicted itself.

In another (lower court) decision in the Second Circuit, *National Credit Union Administration Board v. Concord Limousine, Inc.*, 872 F. Supp. 1174 (E.D.N.Y. 1995), which involved a motion by the plaintiff for a preliminary injunction to freeze assets of the defendants in a suit to recover on alleged guarantees of an obligation owing to an insolvent credit union, the court denied the motion, stating in pertinent part:

> In support of its contention that defendants are liable to transfer their assets to avoid a judgment, plaintiff points to defendants' purportedly fraudulent conveyance of the franchises.

> But plaintiff proffers no evidence tending to show that defendants sold the franchises with the intent to defraud secured creditors.
>
> . . . .
>
> By relaxing the requirements plaintiff must meet in seeking a preliminary injunction, Congress has provided it with a powerful weapon intended to "enhance the ability of . . . Federal bank regulatory agencies to prevent dissipation of property and assets." Cong. Rec. E 3684 at E 3686 (daily ed. Nov. 2, 1990).
>
> At least one court has relied on this legislative history in holding that a federal agency may not seek injunctive relief under this lowered standard without making a showing of fraudulent conduct, noting that "[o]therwise, the statute operates to afford Draconian relief to [the agency] under everyday circumstances." *Floyd*, 827 F. Supp. at 414. [872 F. Supp. at 1177.]

Other district courts around the country have similarly held that Sections 18 and 19 did not authorize the issuance of a preliminary injunction absent allegations which would trigger the application of Section 17. *Resolution Trust Corporation v. Gershman*, 829 F. Supp. 1095 (E.D. Mo. 1993), which was decided two weeks after *Faulkner* and a week before *Floyd*, was, like the instant case, a lawsuit against former directors and officers of a closed financial institution for alleged negligence, gross negligence, and breach of fiduciary duty. In response to the RTC's request to freeze the defendants' assets, the court held that it was not authorized to impose such a freeze without any allegations that the directors and officers had

made fraudulent transfers, defaulted on loans,[1] or took excessive salary or bonuses. The court further held that before such relief can be granted, the plaintiff must show that the defendants benefited economically from their alleged conduct. The court also expressly linked Section 18 to fraudulent transfers ("Courts have ordered equitable relief pursuant to [Section 18] where there was a substantial likelihood that the moving party could prove that the defendant had made fraudulent transfers"), citing *FDIC v. Cafritz*, 762 F. Supp. 1503, 1506 (D.D.C. 1991). The court also said: "Plaintiff does not cite any authority for the proposition [Section 18] authorizes the Court to . . . impose an asset freeze in the absence of any such allegations. Nor does the Court's independent research uncover any such authority." 829 F. Supp. at 1103. *See also RTC v. Spagnoli*, 811 F. Supp. 1005, 1014-15 (D.N.J. 1993) ("Paragraphs 18 and 19 . . . enable the RTC as receiver of a failed thrift to avoid all fraudulent transfers by any party affiliated with the thrift or whom the receiver determines to be a debtor of the failed thrift within five years of the RTC's appointment"); *FDIC v. Hinch*, 879 F. Supp. 1099, 1103-04 (N.D. Okl. 1995) ("The provisions at issue allow the FDIC or RTC to avoid transfers of interests in property . . . made with the intent to hinder, delay or defraud the institution. . . . [T]he statute was designed to enhance the powers of the FDIC in avoiding fraudulent

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[1] In the instant case, while the Complaint contains allegations that the defendants had loans from the Bank, none of these loans were in default until the Bank was seized and the FDIC refused to accept payments, thus creating the alleged defaults.

transfers and thereby to increase potential liability of those who make fraudulent transfers").

In short, all of the relevant authorities, **except** the Ninth Circuit Order, have held that Sections 18 and 19 do not permit the granting of a preliminary injunction absent allegations of fraud or fraudulent conveyances. The Ninth Circuit Order has thus created a conflict in the courts which, respectfully, this Court should resolve.

C. The Legislative History of the Relevant Statutes Supports the Garners' Interpretation of Those Statutes

The Ninth Circuit Order states, "Because we find the statute's text is clear, we need not rely on legislative history." The Ninth Circuit Order then goes on to say that even if the legislative history were relevant, the legislative history is not controlling on the issue at bar, i.e., whether Congress contemplated barring the use of Sections 18 and 19 in the absence of fraud. (Ninth Circuit Order, n. 1.) Respectfully, however, this analysis is flawed. The statutes on their face do not say that a crippling injunction can be issued in any case against any defendant who happens to be unlucky enough to be sued by the FDIC regardless of the allegations made in that case. Resort to the legislative history is necessary to determine Congress' intent in giving the FDIC such a far-reaching, potentially Draconian weapon, if indeed that is what Congress did. Nothing in the legislative history supports the interpretation that this weapon is available in cases merely alleging negligence rather than fraud.

On the contrary, the legislative history shows that the legislative intent underlying Sections 18 and 19 was to combat fraud and to prevent fraudulent transfers, and thus strongly suggests that, as *Floyd* and other cases have held, Sections 18 and 19 were to be interpreted as a "package" with Section 17, as demonstrated by the following references in the legislative history:

(a) House Report No. 101-681(I) ("House Report"), reprinted in 1990 U.S.C.C.A.N. at 6472 et seq., states in the section "Summary and Purpose" that the Taxpayer Recovery Act was intended in part to lessen the "heavy price" which "[s]ociety . . . pays . . . for the activities of 'white-collar' criminals." The report continues, "No more vivid or current example of this price can be found than in the unfolding savings and loan scandal, in which executives of thrift institutions and others associated with them enriched themselves by fraudulently diverting immense amounts of funds from those institutions." 1990 U.S.C.C.A.N. at 6473.

(b) The section in the House Report relating to banking-related statutes, entitled "Banking Law Enforcement," states, under the heading "Background": "[T]his Title . . . responds to the public outcry to bring to justice those who defrauded the savings and loan industry. . . . " 1990 U.S.C.C.A.N. at 6577. As stated above, the three relevant statutes were enacted as part of Subtitle B. The "Banking Law Enforcement" section states in pertinent part with respect to Subtitle B:

> Subtitle B of the legislation, which is aimed at protecting assets from wrongful disposition, expands the authority of the . . . [FDIC] . . . to enjoin the dissipation of assets wrongfully

> obtained. . . . Subtitle B further expands the power of the [FDIC] to void fraudulent transfers . . .

Nothing in the description of Subsection B gives any indication that the FDIC was to be given the power to attach assets in any and every case. The explanation states instead that the authority of the FDIC was being expanded to enjoin "the dissipation of assets wrongfully obtained" and "to void fraudulent transfers," both of which strongly suggest that a nexus would have to be shown between the assets enjoined and the fact that they were wrongfully obtained or fraudulently transferred.

(c) Immediately after the foregoing discussion of Subtitle B, the House Report states that the House Judiciary Committee rejected an amendment to the bill which would have given the FDIC "a priority over all private claimants in suits against the officers, directors, attorneys, accountants, and other employees and agents" of a closed financial institution, and that a similar priority provision had been rejected in 1989 by the House-Senate conference on FIRREA. *Ibid.* For that reason, "[s]uch a provision . . . has not been included in this legislation." 1990 U.S.C.C.A.N. at 6578. However, the interpretation of Sections 18 and 19 espoused by the FDIC would in effect give such a priority to the FDIC, in that if the FDIC could freeze all assets of any defendant, no other claimants could obtain any relief from that defendant.

(d) The lower courts found, as the FDIC contended, that Sections 18 and 19 were not to be construed as a "package" with Section 17 because Section 17 was contained in a different part of Subtitle B as enacted, i.e., Section 17 was added by Section 2528 of Subtitle B, while

Sections 18 and 19 were both added by Section 2521 of Subtitle B. (R.T., Exc. H, p. 17, line 10 – p. 18, line 1.) However, Section 2521 as officially published in the United States Statutes at Large states that Sections 18 and 19 were to be added "by inserting [them] after paragraph (17) (as added by section 2511 of this title) . . . " Thus, Section 17 was originally going to be in Section 2511 of the Act, which would have been the section immediately preceding Section 2521. *See* 104 Stat. 4863. This again establishes that the statutes were intended to be construed together.

(e) On the floor of Congress, Congressman Schumer, the sponsor of the Act, summarized Subtitle B of the new enactment in language very similar to that quoted from the House Report above. (136 Cong. Rec. E 3684 et seq. (Nov. 2, 1990).) Nothing in his comments summarizing the new powers to be granted to the FDIC in any way suggested that the FDIC was being given new powers to freeze the assets of any defendant regardless of the nature of the allegations against that defendant.

(f) A rejected amendment set forth at 136 Cong. Rec. S 9585 would have included the following express language, which is exactly what the FDIC and the lower courts contend that Sections 18 and 19 now allow:

> (1) In an action brought by the [FDIC], involving a scheme to defraud affecting a depository institution, injunctive relief may be granted in conformity with the principles that govern the granting of such relief from threatened loss or damage in other cases, including the possibility that any judgment for money damages might be

> difficult to execute (including secreting or dissipating assets or other similar conduct that might defeat a judgment for money damages), but no showing of special or irreparable injury shall be required to be made.
>
> (2) Upon a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any action described in paragraph (1) if the [FDIC] demonstrates the possibility that –
>
> (A) the defendant is –
>
> (i) an institution-affiliated party who is obligated to the institution or otherwise may be required to provide restitution to the institution; or
>
> (ii) a debtor of the institution; and
>
> (B) the assets of the defendant will be dissipated or otherwise placed beyond the jurisdiction of the court or the agency or corporation before any recovery in favor of the institution may be completed unless a trustee is appointed.

136 Cong. Rec. S 9585 (daily ed. July 11, 1990) (setting forth new proposed section "q"). The fact that this proposed amendment was rejected evidences Congress' intent that even where a scheme to defraud was involved, Congress was not willing to permit injunctive relief where there was a mere possibility of dissipation of assets. The courts should not now imply a judicial gloss on Sections 18 and 19 which in effect would nullify the rejection of this proposed amendment.

In summary, the legislative history supports the Garners' position that Sections 18 and 19 were not intended to give the FDIC the authority to initiate a total prejudgment freeze on a defendant's assets absent either (1) fraud or fraudulent transfers or (2) a nexus between assets allegedly wrongfully obtained and the assets which are sought to be frozen. Moreover, it was never intended that monies earned more than 3 1/2 years after the seizure of a financial institution from completely different sources, i.e., unrelated future earnings from a different employer, should be subject to attachment. Here, no allegations of fraud or fraudulent transfers have been made, and no nexus between the assets which the FDIC sought to freeze and the allegedly wrongful conduct has been shown; the FDIC simply sought to freeze all of the Garners' assets, including even the jewelry on their fingers regardless of when it was obtained, and to force them into bankruptcy. The lower courts erred in broadly interpreting Sections 18 and 19 to permit such a result.

II. THE LOWER COURTS ERRED IN GRANTING AN UNCONSTITUTIONAL, OVERBROAD, AND PUNITIVE INJUNCTION AGAINST THE GARNERS

The injunction originally sought by the FDIC was unprecedented in its scope and would have, among other things, permitted a marshal or even the trustee to enter into the Garners' home to essentially arrest them, to search for and take possession of their assets, and to review all of their mail. (Exc. F.) While the district court did not enter that injunction, the injunction which it did issue was essentially the same, as it imposed exhaustive

costs and nothing short of financial strangulation on the Garners, driving them into bankruptcy. This kind of injunction has never been issued before in a case not involving fraud or a request for traditional and permanent equitable relief. Among other things, the Preliminary Injunction:

– prohibited the Garners from paying any of their bills, entering into any contracts, incurring any liabilities, or conducting any business, except as narrowly provided in the injunction (Exc. 122, CR 122, ¶ 1a-f, pp. 4-6);

– required all property of the Garners "whether personal, tangible or intangible" to be turned over to the trustee, including money which would otherwise have been needed for legal fees and costs, regardless of the source of the funds used to acquire the property or even when the property was acquired (¶ 2a-b, pp. 7-8);

– authorized the trustee to contact third persons in his or her sole and absolute discretion to advise them of the order, including the Garners' banks, credit card companies, insurance companies, and other creditors, regardless of the damage to the Garners' reputation and relationships (¶ 8, pp. 11-12);

– interfered with Gerald Garner's current employment (and perhaps would have deprived him of it) as the Chief Executive Officer of Coast Plaza Doctors Hospital ("Coast"). While the Preliminary Injunction stated that Coast, a limited partnership, would not be precluded from conducting its business in the ordinary course (¶ 1, p. 6, lines 19-22), the injunction appeared to allow the trustee to control the general partner of Coast, thus threatening the existence of a 126-bed acute care hospital

employing 300 people (¶ 4, pp. 8-9; ¶ 11, pp. 12-13; ¶ 22, p. 16);

– authorized the trustee to manage the Garners' assets and "any ongoing business or income producing property," which would have subjected the Garners' estate to unlimited expense (¶¶ 10 and 11, pp. 12-13); and

– required that all money, assets or property hereafter payable to, for, or on behalf of the Garners, or either of them, be paid to the trustee instead (¶ 15, pp. 13-14).

In short, the Preliminary Injunction necessarily insured that the Garners would be divested of their assets indefinitely, regardless of the amount of any future judgment in the case or whether any judgment would in fact be obtained. As indicated above, the injunction was not limited to property which could be traced from the Bank, such as alleged excess compensation, but included personal and treasured items such as Joan Garner's wedding and engagement rings, which were obtained by the Garners early in their 35-year marriage, long before they ever became affiliated with the Bank. There was simply no attempt to tailor the injunction; on the contrary, it was intended to have as crippling an effect as possible. The Preliminary Injunction placed the Garners under complete financial arrest, permanently ruined their credit, and rendered them immediately insolvent. It is absolutely inconceivable that the district court could have found, as it did, that the Garners would not suffer prejudice from the entry of such an injunction, particularly when the FDIC and the trustee mailed hundreds of copies of the Preliminary Injunction to every credit facility and Garner relation, from lists which the FDIC received by invading

the Garners' credit reports and Gerald Garner's office at the Bank.

The Preliminary Injunction froze not only the Garners' personal assets but also all assets of certain allegedly "related entities," which were not even parties to the case and therefore had no standing to object. This was still another violation of due process.

The asserted purpose of the Preliminary Injunction was to conserve the Garners' assets pending the trial of this case, but it failed to accomplish that purpose. The district court voiced its concern at the November 20, 1996 hearing that the

> amount of money to be expended by the trustee and the trustee assistants . . . not be of such amount that, in essence, at the end of the day the public fund is not more assisted than if we had not entered into any order. And that substantially the only benefit to be gained as a result of this exercise will inure to the benefit of the trustee, trustee's staff, trustee's lawyers, trustee's accountant." [R.T., Exc. H, p. 24, lines 8-17.]

In fact, the trustee appointed pursuant to the Preliminary Injunction and his counsel ended up serving a total of four days (between December 6, 1996, when the trustee's bond was posted, and December 10, 1996, when the Garners filed their petition in bankruptcy) and ultimately billed approximately $150,000 for their services – a fitting result given the concerns expressed by the district court

concerning the "blank check" which it was giving the trustee in the Preliminary Injunction.[2]

The lower courts and the FDIC were not only punishing Gerald Garner, but also his wife, who was being singled out because she was married to Gerald Garner. Even if *arguendo* some relief was shown to be necessary against Gerald Garner (which Gerald Garner vigorously disputes), a completely inadequate showing was made as to why such a vindictive order should have been entered against Joan Garner.

The Ninth Circuit found it to be significant that the Garners were allegedly allowed to participate in the drafting of the Preliminary Injunction. 125 F.3d at 1280. However, this alleged right to participate was simply a sham. No meaningful participation was allowed; the parties could not agree on the form or substance of the injunction, and the Preliminary Injunction as issued was the very order which the FDIC proposed. (Exc. 122, CR 122.)

III. CONCLUSION

The Ninth Circuit Order is contrary to all of the other authorities holding that Sections 18 and 19 do not permit the granting of a preliminary injunction absent allegations of fraud or fraudulent conveyances. Moreover, the legislative history of Sections 18 and 19 was either

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[2] The district court has not yet decided whether these fees will be reimbursed from the Garners' estate, but the FDIC has left open the possibility that it will ask the court for such reimbursement.

ignored or incorrectly applied by the lower courts. The Court should hear this matter so that Sections 18 and 19 will be uniformly and consistently applied in the lower courts.

Even if Sections 18 and 19 did authorize the granting of an injunction, the Preliminary Injunction as issued was so broad and punitive as to impose financial ruin on the Garners. It did not simply enjoin the dissipation of assets alleged to have been wrongfully obtained, or seek to unwind fraudulent conveyances (which were not even alleged). It was not designed to, and in fact did not, protect and preserve the Garners' assets pending the outcome of this lawsuit, as obviously the trustee's fees would have dissipated the assets regardless of the outcome of the case. The granting of the Preliminary Injunction should be overturned.

For all of the reasons set forth above, petitioners respectfully request that the Court grant this petition.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver of American Commerce National Bank,

Plaintiff-Appellee,

v.

GERALD J. GARNER; JOAN GARNER,

Defendants-Appellants.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver of American Commerce National Bank,

Plaintiff-Appellee,

v.

DANIEL GARNER,

Defendant-Appellant.

No. 96-56710

D.C. No. CV-96-02668-GHK

No. 96-56754

D.C. No. CV-96-02668-GJK

OPINION

Appeals from the United States District Court for the Central District of California George H., King, District Judge, Presiding

Argued and Submitted
August 6, 1997 – Pasadena, California

Filed September 11, 1997

Before: James R. Browning, Melvin Brunetti, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

COUNSEL

Carol L. Newman, Esq., Los Angeles, California; Gerald J. Garner, in Pro Se, Newport Beach, California; Charles W. Tourdot, Esq., Norwalk, California; and Robert M. Silverman, Esq., Los Angeles, California, for the defendants-appellants.

Jaclyn C. Tanner, Esq., FDIC, Washington, D.C.; Richard B. Noules, Gable Gotwals Mock Schwabe Kihle Gaberino, Tulsa, OK, for the plaintiff-appellee.

OPINION

BRUNETTI, Circuit Judge:

This is a consolidated appeal from the district court's decision to grant a preliminary injunction requested by the Federal Deposit Insurance Corporation freezing Gerald and Joan Garner's assets and appointing a trustee over those assets. The court imposed the injunction during the pendency of a lawsuit filed by the FDIC against the Garners. In the underlying suit, the FDIC seeks to recover damages for torts and statutory violations in

connection with the Garners' management of the American Commerce National Bank. The principal legal question we address is whether the FDIC may invoke a preliminary injunction asset freeze in their suit against the Garners under the Taxpayer Recovery Act absent allegations of fraudulent conduct.

We affirm the grant of the preliminary injunction.

I. FACTS

A. Joan and Gerald Garner's Appeal

On April 30, 1993, the Office of the Comptroller of the Currency ("OCC") closed the American Commerce National Bank ("Bank") pursuant to 12 U.S.C. § 1821(c)(5) because of unsafe and unsound banking practices, including insider abuses. On April 1, 1996, the Federal Deposit Insurance Corporation ("FDIC"), acting as receiver for the bank, brought suit against Gerald Garner, the former Chairman and Chief Executive Officer of the Bank and his wife, Joan, also a former Bank Director. Joan Garner had also borrowed significant amounts of money from the Bank. The FDIC charged the Garners with negligence, gross negligence, breach of fiduciary duty, and lending limit violations, and sought over ten million dollars in damages. In the same complaint, the FDIC sued Gerald Garner's brother, Daniel Garner, also a former Bank Officer.

In the complaint, the FDIC listed numerous "illustrative transactions" of the "types of failures, breaches and violations of duty committed by the [defendants] which damaged the bank." The FDIC alleged that the Bank made

numerous imprudent loans to Joan Garner "simply because she was a bank director and was married to Bank Chairman, Gerald Garner." At the time of the Bank's closing, Joan Garner owed the bank over one million dollars. The FDIC claimed that the Bank made three imprudent loans to Gerald Garner's brother, Harvey, resulting in losses of approximately $185,000. The complaint also alleged that the Bank imprudently honored over 5,000 overdraft checks drawn on an account held by Coast Plaza Doctors Hospital ("CPDH"), a business owned and controlled by Gerald Garner. On the date that the OCC closed the Bank, CPDH owed over $1.2 million for these overdrafts. In total, the complaint detailed eleven imprudent transactions resulting in damages to the Bank in excess of ten million dollars.

On July 22, 1996, the FDIC applied to the district court for an ex parte temporary restraining order ("TRO") freezing the Garners' assets and appointing a temporary trustee while it prosecuted the underlying suit; it also applied for an order to show cause why a preliminary injunction should not issue. The motion relied on 12 U.S.C. §§ 1821(d)(18) and (19), which constitute the asset freeze provisions of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act ("TRA"). In seeking the proposed preliminary injunction, the FDIC argued that the Garners had transferred assets to their family members, trusts, and other entities controlled by them and "appear to have engaged in efforts to transfer, dissipate or otherwise place their assets beyond the reach of their creditors."

The FDIC submitted two declarations in support of the application for the TRO and preliminary injunction. First,

the declaration of Todd Menenberg, an experienced certified public accountant, listed over eighty loans which the Bank imprudently and negligently approved. The FDIC attached over eighty pages of narrative summaries, summaries of deficiencies, and details about the Garners' involvement in granting these loans. The FDIC culled this information from Bank records and depositions. Overall, the declaration addressed loans to nine different entities in painstaking detail. The exhibits listed the amounts and dates of loans, the loan numbers, whether the loans were secured by collateral, and other relevant information. According to Menenberg, the exhibits revealed a consistent practice of improper banking procedures through "imprudently and negligently" approved loans.

The FDIC also submitted the declaration of Pamela Playdon, a senior attorney for the Corporation. Playdon's thirty-nine-page declaration set forth a myriad of improper banking and financial activities by the Garners and echoed many of the charges maintained in the Menenberg declaration. Listed improprieties included: payment of excessive salaries to both Gerald and Joan Garner, payment by the Bank of over $100,000 of the Garners' personal expenses, improper loans to family members, friends, and related business entities, and numerous other questionable financial dealings. In addition, Playdon's declaration set forth the basis for the FDIC's fear of a dissipation of assets by the Garners. This included numerous instances where the Garners failed to comply with subpoenas requesting information on their assets and over fifty examples of asset transfers among the Garners and their family members, trusts, and related

business entities. The FDIC supported the Playdon declaration with 186 exhibits which included the Garners' tax statements, sales receipts, checking account statements, and other financial documents.

On July 26, 1996, the district court entered a minute order under seal declining to rule on the request for a TRO and requesting further briefing from the FDIC on the issues of the standard and scope of the injunctive relief, the constitutionality of the temporary restraining order and whether the defendants' rights were adequately protected under the temporary restraining order. The court noted that the:

> FDIC has made a sufficient showing of its likelihood of success on the merits of its breach of fiduciary duty and negligence claims in the underlying lawsuit. However, it is far from clear that the FDIC has properly applied the standard for a TRO motion brought pursuant to 12 U.S.C. § 1821(d)(18) and (19) to the case at bar.

On August 15, after the FDIC had submitted further briefing addressing the legal basis for injunctive relief, the district court issued an order denying the FDIC's application without prejudice to its reassertion. The court concluded that subsections 1821(d)(18) and (19) did not authorize the court to issue an asset freeze order unless the FDIC either brought a fraudulent conveyance claim under subsection 1821(d)(17), asserted an alternative fraud claim, or sought to collect a prior judgment based on fraudulent activities. The court also held that, alternatively, the FDIC had failed to demonstrate adequately

that it was entitled to injunctive relief under the standards set forth in *FSLIC v. Sahni*, 868 F.2d 1096, 1109 (9th Cir. 1989).

On August 27, the FDIC reapplied for a temporary restraining order and submitted additional briefing on the scope of available injunctive relief. On October 29, the court granted the FDIC's Second Amended Proposed Temporary Restraining Order and set the FDIC's Application for a Preliminary Injunction and Appointment of a Trustee for a show cause hearing.

At the show cause hearing, the court explained that although it had concluded previously that subsections 1821(d)(17), (18), and (19) were to be applied as a package, it was

> now satisfied that a basis for the type of relief sought, putting aside the scope of the relief, exists within the title – the act that is within 12 U.S.C. section 1821(d)(18) and (19), so those sections can provide the type of relief sought by the FDIC separate and apart from any allegation of fraud or fraudulent activity or fraudulent conveyances which may otherwise give rise to claims or actions under 1821(d)(17).

The court also found that the FDIC had made a sufficient showing both of the likelihood of success on the merits of the underlying suit and of the possibility of dissipation of assets by the Garners. Consequently, the court granted the preliminary injunction freezing the Garners' assets.

To ensure that the asset freeze was as narrow as possible, the court ordered the parties to negotiate the terms of the order and to set forth their respective positions on any provisions that could not be agreed upon. On November

25, the parties submitted their proposed order, including annotations and objections from the Appellants. On December 3, the court entered the Preliminary Injunction and Order Appointing a Trustee and ordered the Garners to turn over certain property to the trustee by December 10. The Garners filed a notice of appeal of the asset freeze order with the Ninth Circuit on December 5. The district court denied their application for an emergency stay of the order on December 6.

On December 20, the Garners filed a petition under Chapter 11 of the United States Bankruptcy Code. On January 23, 1997, the district court issued an order appointing a trustee in the bankruptcy proceeding, subjecting action under the preliminary injunction asset freeze order to the automatic stay provisions of 11 U.S.C. § 362(a), and barring the FDIC from taking any action to enforce the asset freeze order. The district court, however, modified the Chapter 11 automatic stay to permit the Garners to prosecute this appeal and to allow the FDIC to proceed with its underlying district court action against the Garners and others. This appeal timely followed.

B. Daniel Garner's Appeal

Daniel Garner appeals the inclusion of two trusts, G Family Trust Number Two and G Family Trust Number Twelve, in the preliminary injunction asset freeze. He contends that there was "no evidence before the court [that] either Gerald Garner or Joan Garner has any interest in the corpus of either of the aforestated trusts." Therefore, Daniel Garner contends, the trusts "should not have been usurped into the province of this preliminary

injunction as no facts were presented, which would have warranted such a finding."

II. Standard of Review

A district court's order regarding preliminary injunctive relief is subject to limited review. The grant of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of facts. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). Although district courts have wide discretion in issuing preliminary injunctions, "where the district court is alleged to have relied on erroneous legal premises, review is plenary." *Id.* 83 F.3d at 1152 (quoting *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc)).

III. Analysis

A. Standards for Issuance of Preliminary Injunction

Federal Rule of Civil Procedure 65 provides the general procedure for obtaining a preliminary injunction. This court has articulated legal standards governing the issuance of a preliminary injunction:

> To obtain a preliminary injunction a party must demonstrate either 1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor.

Metro Pub. Ltd. v. San Jose Mercury News, 987 F.2d 637, 639 (9th Cir. 1993); *see also* 13 Moore's Federal Practice, § 65.22[5][i] (Matthew Bender 3d ed.1997). In granting the preliminary injunction, the district court focused its analysis on the probability of success/irreparable injury test.

B. Subsections 1821(d)(18) and (19) Authorize Preliminary Relief Without Allegations of Fraudulent Conduct

The district court twice rejected the FDIC's attempts to enforce a TRO and preliminary injunction under the standards for injunctive relief promulgated in 12 U.S.C. §§ 1821(d)(18) and (19). Although the court noted that the "FDIC has shown that it was likely to succeed on the merits" of the case, it questioned the FDIC's use of subsections (18) and (19) as authorization for issuing the preliminary injunction.

The district court eventually concluded that the preliminary injunction provisions of the Taxpayer Recovery Act applied to authorize the FDIC's motion for an asset freeze. We agree with the court's interpretation of the statute. 12 U.S.C. § 1821(d)(18) provides that, at the request of the FDIC, any court of competent jurisdiction may:

> issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation . . . under the control of the court and appointing a trustee to hold such assets.

Subsection 1821(d)(19) modifies Rule 65's requirements for injunctive relief when the FDIC is the applicant:

> Rule 65 . . . shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

The Appellants contend that the district court erred in issuing the preliminary injunction freezing their assets because "[s]ections 18 and 19 were not intended to give the FDIC the authority to initiate a total pre-judgment freeze on a defendant's assets absent either (1) fraudulent transfers or (2) a nexus between assets allegedly wrongfully obtained and the assets which the FDIC seeks to freeze."

Appellants argue that Congress enacted subsections (18) and (19) in conjunction with subsection (17) and intended for them to be used as a package. 12 U.S.C. § 1821(d)(17), entitled "Fraudulent transfers," allows the FDIC to

> avoid a transfer of any interest of an institution-affiliated party . . . if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution.

The Appellants contend that the FDIC's invocation of subsections (18) and (19) without the use of section (17) or other allegations of fraud is impermissible. They argue that neither case law, statutory interpretation of the TRA, nor the legislative history of the statute supports the use of subsections (18) and (19) absent some showing of fraud. We reject this contention.

1. Interpretation of Section 1821(d)

In granting the injunction, the district court concluded that:

> a basis for the type of relief sought . . . exists within the title . . . so [subsections 1821(d)(18) and (19)] can provide the type of relief sought by the FDIC separate and apart from any allegation of fraud or fraudulent activity or fraudulent conveyances which otherwise may give rise to claims or actions under 1821(d)(17).

Although the Ninth Circuit has not addressed the present question, other circuits have examined similar issues involving the use of 1821(d) both with and without allegations of fraud.

Here, the district court's decision expressly rejected the analysis in the Appellants' primary case, *FDIC v. Floyd*, 827 F.Supp. 409 (N.D.Tex.1993). In *Floyd*, the court required a showing of fraudulent conduct before the FDIC could use 1821(d)(18) and (19) to freeze an individual's assets to collect on a promissory note. *Floyd*, 827 F.Supp. at 412. In support of this decision, the court pointed to the "grouping of subsections (18) and (19) with subsection (17), which allows the FDIC to avoid fraudulent transfers. The common-sense approach is to read the three subsections as a package." *Id.* at 413; *see also FDIC v. Faulkner*, 991 F.2d 262, 264-65, 268 (5th Cir. 1993) (affirming asset freeze when fraud was alleged under 1821(d)(17)); *RTC v. Cruce*, 972 F.2d 1195, 1199-1200 (10th Cir. 1992) (affirming asset freeze when fraud was evidenced); *FDIC v. Cafritz*, 762 F.Supp. 1503, 1508

(D.D.C.1991) (affirming asset freeze upon proof of previous fraudulent activity concerning a portion of the assets to be frozen). The court concluded that when an "underlying lawsuit does not allege fraudulent activity . . . a petition for preliminary injunction must show some potential injury evidenced by a clear nexus between past fraudulent conduct and the property for which restraint is sought under the facts of the underlying suit." *Floyd*, 827 F.Supp. at 414.

We reject *Floyd's* reasoning and hold that the FDIC can use subsections (18) and (19) in the absence of either subsection (17) or other allegations of fraud. We look to the plain language of the statute for guidance and, if necessary, augment our analysis with the legislative history. *See Alarcon v. Keller Indus., Inc.*, 27 F.3d 386, 389 (9th Cir. 1994) ("[W]e look first to the plain language of the statute, construing the provisions of the entire law, including its objects and policy to ascertain the intent of Congress. Then, if the language is unclear we look to its legislative history.") (citations omitted).

Subsection (17) explicitly authorizes the avoidance of fraudulent transfers involving banking institutions. It is obvious that the thrust of this provision is to recover transactions which defraud "the insured depository institution . . . or any other appropriate Federal banking agency." 21 U.S.C. § 1821(d)(17). On the other hand, subsection (18) is a more general provision. It allows the FDIC to obtain injunctive relief on the assets of "any person designated by the corporation." 21 U.S.C. § 1821(d)(18). Nothing in the statutory language limits the application of subsection (18) to persons involved in

fraudulent activity. Consequently, we find the plain language of the statute persuasive.

In addition, we note that numerous subsections of 1821(d) are cross-referenced; in fact, subsections (18) and (19) refer to each other. However, subsection (17) is not cross-referenced to either (18) or (19) and as we noted, the text of subsection (18) does not limit its use to fraudulent transfers. Thus, we decline to hold that the proximity of the subsections and their related subject matter mandates that they be used in conjunction.

We do not dispute that subsections (17)-(19) are often used as a package; injunctive relief is clearly an effective weapon for avoiding the type of fraudulent transfers contemplated by subsection (17). As this case demonstrates, however, the FDIC must be able to employ injunctive relief to preserve assets in other banking-related situations as well. We might be persuaded by the Appellants' arguments if the FDIC sought an injunction for assets wholly unconnected to banking activity. But where the defendants, like the Garners in the underlying suit, are officers and directors of the failed bank, and the FDIC alleges that they damaged the bank through illegal activities involving bank assets, then the FDIC may use the TRA to freeze assets absent allegations of fraud.

Here, the FDIC is acting as receiver for the failed financial institution under the TRA. As part of that receivership, it has sued the Garners for the alleged insider dealing which the FDIC claims inured to the benefit of the Garners. The FDIC is seeking damages against the Garners for the harm they caused the Bank with their illegal dealing; it seeks the injunction under the powers

granted to it by subsections (18) and (19) to secure the Garners' assets from dissipation in contemplation of satisfaction of a judgement against the Garners. If the FDIC were to prevail in the underlying suit, it would look to the assets subject to the preliminary injunction to satisfy any money judgment rendered against the Garners.[1]

Congress enacted subsections 1821(d)(18) and (19) to "enhance the ability of the Justice Department and Federal bank regulatory agencies to prevent dissipation of property and assets." 136 Cong. Rec. E3686 (daily ed. November 2, 1990) (remarks of Rep. Schumer). In this case, FDIC attempts to do no more than what was intended by the legislature. We do not believe that Congress intended to limit the FDIC in its use of injunctive relief to counter banking violations. In terms of the costs

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[1] Because we find the statute's text is clear, we need not rely on legislative history. We do note that *Floyd* examined the legislative history and held that the "clear intent of Congress in these subsections is to address fraudulent activity." *Floyd*, 827 F.Supp. at 413; *see also Cruce*, 972 F.2d at 1199 ("The text of § 1821(d)(17)-(19) evidences Congress' clear intent to augment the RTC's ability to avoid fraudulent conveyances or to freeze assets that may have been fraudulently conveyed by parties related to insured depository institutions.").

Our analysis of the legislative history does not lead us to such a firm conclusion. The Appellants cite commentary which broadly discusses Congress' goal of preventing fraudulent transfers through enactment of the TRA. *See* 136 Cong. Rec. E3684-86 (daily ed. November 2, 1990) (statement of Rep. Schumer). However, the record provides nothing to indicate that Congress contemplated barring the use of these provisions in the absence of fraud; only that fraud is the primary target of the law. Thus, we do not find the legislative history controlling on this issue.

imposed upon the government and taxpayers by such illegal actions, little difference exists between cases involving fraud and those which incur damages due to banking violations. Handcuffing the FDIC where it chooses to prosecute negligent or imprudent banking practices but does not charge fraud would contradict the manifest aim of the Taxpayer Recovery Act. Thus, we hold that the FDIC can apply the Act's injunctive relief provisions in the absence of allegations of fraud.

C. Do the Facts Meet the Standard for Issuance of a Preliminary Injunction?

Having determined that the FDIC used section 1821(d) properly, we turn to a limited analysis of the district court's decision to grant the preliminary injunction.

1. Likelihood of Success on the Merits

The district court concluded that the FDIC demonstrated a likelihood of success on the merits in the breach of fiduciary duty and negligence claims.

The FDIC submitted two declarations (Menenberg and Playdon), supported by nearly 200 exhibits detailing allegations of negligence, gross negligence, and breach of fiduciary duty. The FDIC argues that the exhibits demonstrate that "the Garners repeatedly abused their insider positions at the Bank by grossly overcompensating themselves, by approving imprudent loans . . . and by their use of bank funds to fund their own personal expenditures." A review of the exhibits firmly supports the

court's finding of a likelihood of success on the merits of the FDIC's claims.

Although the Appellants dispute the district court's findings, they fail to present any concrete arguments casting doubt on the court's conclusions. Absent such a showing by appellant, we must accept the district court's decision on this issue; it was not clearly erroneous. *See Does 1-5*, 83 F.3d at 1152.

2. Possibility of Irreparable Injury

Under 1821(d)(19), a preliminary injunction may be issued "without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate." *See* 12 U.S.C. § 1821(d)(19); *see also Cruce*, 972 F.2d at 1200 ("Congress clearly intended to reduce the RTC's burden-vis a vis other litigants in similar situations-when it seeks to freeze assets").

Other courts have held that this provision does not eliminate the requirement for demonstrating some form of injury. *See id.* ("We emphasize that our holding does not eliminate the RTC's burden to show potential injury when it seeks a preliminary injunction."); *see also* 136 Cong. Rec. E3686 (daily ed. November 2, 1990) (remarks of Rep. Schumer) ("Congress still intends that the Corporation be required to make some showing of injury prior to obtaining relief"). Other courts have formulated a standard for the required showing: "Though the injury complained of need not be irreparable, it must be imminent, not remote or speculative. Plaintiff must show that it is

likely to suffer . . . harm if equitable relief is denied." *Nat'l Credit Union Admin. Bd v. Concord Limousine, Inc.*, 872 F.Supp. 1174, 1177 (E.D.N.Y.1995) (internal quotations omitted) (citations omitted). We agree with this cogent standard and hold that a possibility of harm must be evident before a court may grant injunctive relief under subsection (19).

Here, the district court found that "there is at least a possibility that assets of Defendants Gerald Garner and Joan Garner will be dissipated during the pendency of this action unless injunctive relief is ordered by this Court." As with the analysis for likelihood of success on the merits, we must give substantial deference to the district court's factual findings. *See Does 1-5*, 83 F.3d at 1152. The Playdon declaration exhaustively detailed the FDIC's allegations concerning dissipation of assets. The district court soundly relied upon the declaration in assessing the possibility of dissipation of assets.

Although the Garners contest this finding, they again fail to provide any evidence to counter the FDIC's extensive documentation. They rely mainly on declarations submitted by their children. These arguments are insufficient to defeat the FDIC's proof of the possibility of dissipation of assets.

Based on the extensive allegations and documentation submitted, we affirm the court's ruling that the FDIC satisfied subsection 1821(d)(19)'s dissipation of assets standard.

D. The Injunction is Neither Unconstitutional nor Overbroad

The Appellants also contend that the preliminary injunction is unnecessarily punitive and overbroad and that its provisions violate their due process rights. The Garners direct this claim toward the preliminary injunction which they participated in drafting. The district court allowed Appellants the opportunity to review and comment upon the proposed order before issuing the injunction. Appellants cite no cases to support their due process claims and do not discuss how their participation affected this issue. Accordingly, the issue is waived. *Seattle School Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1502 (9th Cir. 1996) (holding that party waives issue when it "present[s] no explanation in support of its contention of error.")

The Appellants also claim that the preliminary injunction is punitive and overbroad. This argument is directed essentially at the district court's approval of the settlement. As such, it is a factual review subject to the clearly erroneous standard. *Does 1-5*, 83 F.3d at 1152.

The Appellants also present no evidence that the court failed to perform a detailed review. To the contrary, the show cause hearing revealed that the district court carefully considered the proposed injunction and encouraged the parties to do the same. For example, the court stated, "I actually have gone through paragraph by paragraph and taken notes . . . although I can tell you I have my own thoughts about certain paragraphs, whether they ought to be in or out or modified or whatever. . . . " The district court's reasoned decision that the injunction was neither punitive nor overbroad was not clearly erroneous.

The Appellants also argue that the district court improperly applied section 1821(d) retroactively. Because the Appellants failed to raise this argument in their opening brief, we deem it waived. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992).

E. Gerald Garner Held and Used G Family Trusts Numbers Two and Twelve and they were Properly Included in the Preliminary Injunction.

Daniel Garner contends that the district court improperly included G Family Trusts Numbers Two and Twelve. He claims that Gerald Garner had neither a personal interest nor did he commingle his assets with the two trusts. The Garners specifically deny any improper contact with the trusts and the FDIC has made assertions to the contrary. We again review the court's factual findings under a clearly erroneous standard. *See Does 1-5*, 83 F.3d at 1152.

A court is authorized to impose a preliminary injunction on assets which were controlled by a party, even if that party did not expressly own or possess those assets. *See United States v. O'Brien*, 836 F.Supp. 438, 441-42 (S.D.Ohio 1993) (holding that defendant's control or beneficial ownership of assets is sufficient to make them subject to restraint and forfeiture pursuant to statute authorizing preliminary injunction); *see also Faulkner*, 991 F.2d at 267 (allowing preliminary injunction freezing assets where non-party "actively participated . . . in transferring assets fraudulently").

The FDIC made three principal factual assertions concerning Gerald Garner's involvement in the contested trusts. First, the FDIC alleges that "Gerald Garner paid

substantial taxes for the trusts from his personal funds," an action which Daniel Garner fails to deny or explain. The FDIC also alleges that Gerald Garner caused substantial funds to be transferred between Trust Number Two and Coast Plaza Doctors Hospital; Gerald Garner chaired the hospital's board, his children nominally owned the general partner, and Daniel Garner possessed no interest in the business. Finally, and most significantly, the FDIC claims that "Gerald Garner caused substantial assets from the G Family Trust #2 to be used for his personal benefit." The exhibits attached to Pamela Playdon's declaration provide substantial support for these assertions. Our review of the documents indicates that the district court did not err in relying on these factual conclusions.

Daniel Garner's unsupported assertions that G Family Trusts Numbers Two and Twelve were not connected with Gerald Garner do not counter the FDIC's extensive evidence to the contrary. The district court's findings were not clearly erroneous. Accordingly, we affirm the district court's inclusion of the trusts in the preliminary injunction.

AFFIRMED.

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver of American Commerce National Bank, Plaintiff, v. GERALD GARNER, JOAN GARNER, EUGENE ALTERMAN, NORMAN CHARNEY, GALAL GOUGH, ROBERTA HELSING, as Administratrix of the Estate of DUFFERN HELSING, JUDY MANDEL, and DANIEL GARNER, Defendants.	CASE NO. CV 96-2668-GHK (ANx) **FDIC's ORDER GRANTING PRELIMINARY INJUNCTION ATTACHING ASSETS AND APPOINTING A TRUSTEE TO HOLD ASSETS** (Filed Dec. 3, 1996)

This matter came on for hearing before the Court on the 20th day of November, 1996, on the Application of Plaintiff, the Federal Deposit Insurance Corporation ("FDIC"), as Receiver of American Commerce National Bank ("ACNB"), for an Order to Show Cause regarding issuance of a Preliminary Injunction Attaching the Assets of Defendants Gerald Garner and Joan Garner and Appointing a Trustee to Hold Such Assets. FDIC appeared by its counsel of record, Richard B. Noulles, Sidney G. Dunagan, and John Henry Rule; Defendant

Joan J. Garner appeared *in propria per sona*; Defendant Joan G. Garner appeared by her counsel of record, Robert M. Silverman and Carol Newman; Defendant Daniel J. Garner appeared by his counsel of record, Charles W. Tourdot, II; and Metro Commerce Bank appeared by counsel, Michael B. Lubic. Upon consideration of the allegations in FDIC's Complaint, the Declarations submitted with FDIC's Application, the Memorandum of Points and Authorities submitted in support of FDIC's Application, the opposition papers submitted by Defendants Gerald Garner, Joan Garner and Daniel Garner, and the arguments of counsel, the Court finds that FDIC is entitled to the relief sought.

The Court also finds as follows:

(1) This Court has jurisdiction over this matter pursuant to 12 U.S.C. §1441 (a) (1) (7), 12 U.S.C. §1821 (d) (18) and 28 U.S.C. §1331. Venue is proper in this Court pursuant to 28 U.S.C. §1391 (b).

(2) FDIC's Complaint sets forth claims against Defendants for, *inter alia*, gross negligence, negligence and breach of fiduciary duty, and FDIC has presented sufficient evidence that it is likely to succeed on its claims against Defendants to satisfy the requirements established by *Taylor v. Honig*, 910 F.2d 627, 631 (9th Cir. 1980); *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989); and *FDIC v. Cafritz*, 762 F. Supp. 1503, 1059 (D. D.C. 1991).

(3) Given the nature of the relief sought by FDIC and the protections provided by the Defendants' assets being conserved and administered by a court appointed trustee, Defendants Gerald Garner and Joan Garner will not suffer

any substantial harm if FDIC's Motion is granted.

(4) Given the evidence indicating that Defendants Gerald Garner and Joan Garner have transferred substantial assets to their family members, trusts and other entities controlled by them, have transferred assets between and among themselves and such trusts and entities without regard to the nominal ownership of such trusts and entities, and appear to have engaged in efforts to transfer, dissipate or otherwise place their assets beyond the reach of their creditors, and the fact that their assets are substantially insufficient to satisfy the damages claimed in the Complaint, the Court finds it likely that FDIC will suffer significant harm in the absence of relief being granted under 12 U.S.C. §1821 (d) (18) – (19).

(5) The Court further finds that the public interest favors granting the relief sought by FDIC.

1. IT IS THEREFORE HEREBY ORDERED that during the pendency of this action the prohibitions under the Temporary Restraining Order previously entered by the Court shall remain in effect and, in accordance therewith, Defendants Gerald Garner and Joan Garner, and any of their officers, agents, servants, employees, and attorneys, those persons in active concert or participation with them (or either of them) who receive notice of this Order by personal service or otherwise, are hereby restrained and enjoined from directly or indirectly:

a. Selling, transferring, assigning, dissipating, concealing, encumbering, pledging, hypothecating, impairing or otherwise disposing of

any and all money, assets and property, whether real, personal, tangible or intangible, owned, controlled by or held for the benefit of Gerald Garner and Joan Garner, or either of them, except as hereinafter provided;

b. Incurring any liabilities, obligations or debts in the name of or on behalf of Gerald Garner and Joan Garner, or either of them, including but not limited to any credit card debts, other than those required for the reasonable necessities of life as hereinafter provided;

c. Selling, transferring, assigning, dissipating, concealing, encumbering, pledging, hypothecating, impairing or otherwise disposing of any and all money, assets and property, whether real, personal, tangible or intangible, owned, controlled by or held for the benefit of Gerald Garner and Joan Garner, or either of them, including but not limited to any interest in any of the following entities and any money, assets or property held by any of the following entities (the "Garner-Related Entities"), except as hereinafter provided:

G Family Trust #1
G Family Trust #2
G Family Trust #3
G (Family) Trust #1, a/k/a G Trust #1
G (Family) Trust #2, a/k/a G Trust #2
G (Family) Trust #3, a/k/a G Trust #3
G (Family) Trust #4, a/k/a G Trust #4
G (Family) Trust #11, a/k/a G Trust #11
G (Family) Trust #12, a/k/a G Trust #12
G (Family) Trust #13, a/k/a G Trust #13
G (Family) Trust #69, a/k/a G Trust #69
RSC Trust #1
RSC Trust #2

RSC Trust #3
Seepeedee, Inc., formerly known as Coast Plaza Doctors
Hospital, Inc.
Associated Partners of Coast Plaza, Inc.
Mediquip Corporation
Med-Law Business Consultants, Ltd.
Medifin Consultants, Ltd.
Nido Associates
Stockton Associates
Nido/Stockton Associates, Ltd.
Roscaig Associates, Inc.

d. Incurring any liabilities, obligations or debts in the name of or on behalf of the Garner-Related Entities, including but not limited to any credit card debts, except as hereinafter provided;

e. Destroying, altering, disposing of, secreting, or transferring to a different location any documents, writings or records (including, but not limited to, deeds, titles, assignments, promissory notes, mortgages, conveyances, bank records of any type, and any data stored on any computer, tape or electronic database) regarding any money, assets or properties owned by, held for or controlled by Gerald Garner and Joan Garner, or either of them, or any of the Garner-Related Entities, or regarding any liabilities, debts or obligations of Gerald Garner and Joan Garner, or either of them, or any of the Garner-Related Entities; and

f. Entering into any contracts, acquiring title to any property (whether real, personal, tangible or intangible) or conducting any business through or in the name of any person or entity other than their own individual names,

i.e., Gerald Garner and/or Joan Garner, or any existing entity through which each of them has already conducted business, without prior approval by the Court.

Provided, however, this paragraph 1 shall not: (i) preclude Coast Plaza Doctors Hospital, Ltd., a California limited partnership (the "Hospital"), from conducting its business in the ordinary course, but any payments made by the Hospital to or for the benefit of Defendants Gerald Garner, Joan Garner, or any entity owned, controlled by or held for the benefit of Gerald Garner and Joan Garner, or either of them, including but not limited to any Garner-Related Entity, shall be made to the Trustee as hereinafter provided; or (ii) preclude the payment in the ordinary course by the Trustee:

(1) to Anne Goldberg (Gerald Garner's mother), from any trust defined among the Garner-Related Entities on which she is an income beneficiary, for her reasonable and necessary living expenses, not to exceed aggregate payment of $50,000 per annum; or

(2) to the income beneficiary (other than Gerald Garner or Joan Garner) of any of the trusts defined among the Garner-Related Entities, for the beneficiary, an amount up to the current income only of the trust.

2. **IT IS FURTHER HEREBY ORDERED** that Ronald L. Durkin ("Trustee") is hereby appointed as Trustee, pursuant to 12 U.S.C. §1821 (d) (18), of:

a. all money, assets and property, whether personal, tangible or intangible, owned, controlled by or held for the benefit of Gerald Garner and Joan Garner, or either of them,

including but not limited to all funds on deposit in any financial institution, all stocks, bonds and other securities of any type, all partnership interests, all art, jewelry and precious metals (including but not limited to all art and jewelry listed on Exhibit A attached hereto), all automobiles, boats, airplanes and other vehicles, all real estate and any improvements thereon and furniture, fixtures or other personalty located thereat, all interests in any insurance policies and any proceeds therefrom, all rights to any safe deposit boxes and the contents thereof, and all accounts receivable, claims and choses in action (all of which are included whenever the terms "money, assets and property" or "money, assets or property" are used in this Order); and

b. the Garner-Related Entities and all money, assets and property owned, controlled by or held for any of the Garner-Related Entities, with the exception of the Hospital.

Whenever the phrase "money, assets and property subject to this Order" or the phrase "money, assets or property subject to this Order" is used in this Order, such phrase shall include items (a) and (b) described above, but does not include any money, assets or property left in the possession of or delivered to Gerald Garner or Joan Garner pursuant to this Order.

3. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized to retain any agents necessary to carry out and perform his duties under this Order, including, without limitation, legal counsel, accountants and managers for specific assets. The Trustee shall give

written notice to Gerald and Joan Garner and their counsel of agents the Trustee retains. The term "Trustee" hereinafter includes the Trustee and any agents or employees designated in writing by the Trustee to act pursuant to this Order.

4. IT IS FURTHER HEREBY ORDERED that Defendants Gerald Garner and Joan Garner, any trustee, agent, employee, partner, joint venturer, attorney or representative of either such Defendant, and any other person or entity who receives notice of this Order by personal service or otherwise and who directly or indirectly holds any money, assets or property subject to this Order, shall deliver to the Trustee immediate custody, control and/or possession of all money, assets and property subject to this Order; provided, however, the Trustee need not take possession or retain any money, assets or property he believes would be unduly burdensome to maintain.

5. IT IS FURTHER HEREBY ORDERED that Defendants Gerald Garner and Joan Garner and any trustee, agent, employee, partner, joint venturer, attorney or representative of either such Defendant, and any other person who receives notice of this Order by personal service or otherwise and who directly or indirectly holds any documents, writings or records, in whatever form (including computer records, audio or video tapes, telephone records and records maintained on any electronic database) that may evidence, reflect or relate to, in any manner, any of the money, assets or property subject to this Order, is hereby prohibited from destroying, altering, disposing of, secreting, or transferring to a different location any such documents, writings or records, and shall

deliver all such documents, writings and records to the Trustee together with a declaration under penalty of perjury that all such documents, writings and records have been delivered, or shall provide a declaration under penalty of perjury that there are no such documents, writings or records; provided, however, the Trustee need not take possession or retain any documents, writings or records he believes would be unduly burdensome to maintain.

6. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized and empowered to collect, receive and take custody, control, possession and charge of all money, assets and property subject to this Order; provided, however:

a. Defendants Gerald Garner and Joan Garner shall be entitled to continue residing in their residences at 10 Burning Tree, Newport Beach, California, and 73165 Ironwood Drive, Palm Desert, California, and shall be entitled to retain under their custody, possession and control in such residences such items of furniture, fixtures, appliances and other personal effects as shall be reasonably necessary for their continued residence therein (excluding, however, any items of art, jewelry, artifacts or similar items which the Trustee determines, in his discretion, to be of substantial value) and one automobile apiece for Gerald Garner and Joan Garner, of their selection; and

b. the Trustee need not take custody, control, possession and charge of any assets or property which the Trustee believes to have a value of less than $1,000.00 or which the Trustee believes would be unduly burdensome to maintain.

7. IT IS FURTHER HEREBY ORDERED that Defendants Gerald Garner and Joan Garner shall deliver to the Trustee, at a time and place to be determined by the Trustee, but not later than 5:00 p.m. Pacific time on December 10, 1996, the property identified on Exhibit A attached hereto, and the property identified on the inventory list provided by Defendants Gerald Garner and Joan Garner to FDIC's counsel on or about November 13, 1996. Counsel for the FDIC shall deliver said inventory list to the Trustee within five (5) days of the entry of this Order.

8. IT IS FURTHER HEREBY ORDERED that the Trustee is authorized to give notice of his appointment and of this Order (which may be by a photocopy or fax copy of this Order) to (i) any bank, savings bank or other financial institution, any mutual fund, stock broker, public utility company, public or private corporation, partnership, joint venture or other person or entity known to or believed by the Trustee to be holding any money, assets or property subject to this Order, (ii) the trustee of any trust holding any money, assets or property subject to this Order, (iii) any insurance company which has issued a policy in favor of Defendants Gerald Garner and Joan Garner or either of them, or any of the Garner-Related Entities, (iv) all persons owing any money to Gerald Garner and Joan Garner, or either of them, or to any entity controlled by either of them, including, without limitation, all of the Garner-Related Entities, (v) all known creditors of Gerald Garner and Joan Garner, or either of them, or any of the Garner-Related Entities, including but not limited to any bank or other financial institution and any credit card issuer, and (vi) any other person or entity having an interest or holding or retaining

within their control any other money, assets or property subject to this Order, or holding or retaining any documents, writings or records relating to such money, assets or property.

9. **IT IS FURTHER HEREBY ORDERED** that Defendants Gerald Garner and Joan Garner shall, within thirty (30) days of the entry of this Order, deliver to the Trustee a full and complete inventory, under oath, of all money, assets and property in which either of them has any direct or indirect interest, including, but not limited to, any money, assets and property controlled by or held for the benefit of either of them, any interest in any of the Garner-Related Entities and any money, assets and property held by any such entity.

10. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized to take all necessary and reasonable steps to preserve and maintain all money, assets and property subject to this Order, and all documents, writings or records, in whatever form, that evidence, reflect or relate to, in any manner, any of the money, assets and property subject to this Order. Moreover, the Trustee is authorized to investigate and take all steps necessary to set aside and recover any fraudulent transfers of any interest or assets of Defendants Gerald Garner and Joan Garner, or either of them, since April 30, 1988.

11. **IT IS FURTHER HEREBY ORDERED** that the Trustee shall have the full power and right to direct and manage any ongoing business or income producing property that is included among the money, assets and property subject to this Order in the same manner as a reasonable, prudent owner of such ongoing business or

income producing property, and the Trustee shall be entitled to make any day-to-day business decisions regarding such ongoing business concern or income producing property, and to receive and collect all rents, issues, profits and security deposits and income from such ongoing business concern or income producing property.

12. IT IS FURTHER HEREBY ORDERED that notwithstanding any other provision of this Order, the Trustee is not authorized to direct, manage or conduct the day-to-day business affairs of the Hospital.

13. IT IS FURTHER HEREBY ORDERED that the Trustee shall not sell or dispose of any money, asset, or property obtained by him under this Order except upon further Order of the Court.

14. IT IS FURTHER HEREBY ORDERED that the Trustee shall give counsel for FDIC and counsel for Defendants Gerald Garner and Joan Garner access, at reasonable times and places, to all documents the Trustee obtains that relate to, in any manner, any of the money, assets or property over which the Trustee takes custody, control or possession; provided, however, except upon further Order of the Court, the FDIC shall not be provided access to the inventories of money, assets and property previously delivered to FDIC's counsel by Gerald Garner and Joan Garner or delivered to the Trustee by Gerald Garner and Joan Garner pursuant to this Order.

15. IT IS FURTHER HEREBY ORDERED that all money, assets or property which may hereafter be payable to Gerald Garner and Joan Garner, or either of them, or to any person for or on behalf of Gerald Garner or Joan Garner, or to any of the Garner-Related Entities, by any

other person or entity, whether for pre-existing debts or for salaries, bonuses, fees, expense reimbursement or other compensation earned subsequent to the date of this Order and payable to Gerald Garner, Joan Garner, or any of the Garner-Related Entities shall, in lieu of being paid or delivered to Gerald Garner, Joan Garner or such Garner-Related Entity, be paid or delivered to the Trustee.

16. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized to remove Gerald Garner and Joan Garner, or either of them, as signatory to any bank account to which they, or either of them, may be a signatory and that is held in the name of or for the benefit of Gerald Garner or Joan Garner or any of the Garner-Related Entities, and to substitute the Trustee as signatory to any and all such accounts.

17. **IT IS FURTHER HEREBY ORDERED** that following the entry of this Order Gerald Garner, Joan Garner and the Garner-Related Entities shall not withdraw or remove any item from any safe deposit box held by or for them, or either of them, except upon Order of this Court, and any bank or financial institution in which Gerald Garner, Joan Garner or any of the Garner-Related Entities has a safe deposit box shall not, after receipt of a copy of this Order, allow any access to any such safe deposit box except upon Order of this Court.

18. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized to establish separate bank accounts, as Trustee, in which all income generated from the money, assets and property subject to this Order and any other funds received by the Trustee under the terms of

this Order, shall be held by the Trustee for preservation until otherwise ordered by the Court.

19. IT IS FURTHER HEREBY ORDERED that the Trustee is authorized to pay all reasonable expenditures deemed necessary for the management, maintenance or preservation of the money, assets and property subject to this Order, including, without limitation, necessary local, state and federal taxes, costs of maintaining assets, insurance, the reasonable cost to employ agents, accountants and attorneys, and general costs of continuing and managing any ongoing business concern or income producing property placed under the Trustee's custody, control or possession.

20. IT IS FURTHER HEREBY ORDERED that the Trustee is authorized to exercise all rights, powers and obligations which Defendants Gerald Garner and Joan Garner or either of them, may have by reason of ownership of stock in both publicly and non-publicly traded corporations, including, without limitation, the right to vote the shares of stock at any shareholders meeting pursuant to the Bylaws and Articles of Incorporation of that corporation and otherwise participate in the management, operation and control of the corporation as allowed pursuant to the Bylaws and Articles of Incorporation. The decisions regarding voting of shares, and other involvement in the affairs of any such corporation, are in the discretion of the Trustee, who shall give due consideration to preserving and maximizing the value of the money, assets and property subject to this Order.

21. IT IS FURTHER HEREBY ORDERED that the Trustee is authorized to exercise all other rights incident

to any investment in which Defendants Gerald Garner and Joan Garner or either of them, have participated, whether as a partner, joint venturer or otherwise.

22. **IT IS FURTHER HEREBY ORDERED** that the Trustee is authorized to remove any officer or employee from any entity owned or controlled by Defendants Gerald Garner and Joan Garner, or either of them, including but not limited to any of the Garner-Related Entities.

23. **IT IS FURTHER HEREBY ORDERED** that any person, firm, corporation, or other entity with notice of this Order and which holds, or is a depository of, any money, assets or property subject to this Order, is prohibited, until further order of this Court, from transferring, withdrawing, removing, or disposing of such money, assets or property except for purposes of transferring such money, assets or property to or at the written direction of, or with the written approval of, the Trustee.

24. **IT IS FURTHER HEREBY ORDERED** that the Trustee and his agents, including but not limited to legal counsel and accountants, shall be entitled to reasonable compensation for services rendered, and reimbursement for reasonable expenditures incurred, in carrying out the Trustee's duties under this Order. As soon as practicable after entry of this Order, the FDIC shall advance the sum of $10,000.00 (the "Advance") to provide for the out-of-pocket expenses it is anticipated the Trustee will need to incur immediately following his appointment. Commencing with the month following the month in which the Trustee is appointed, and continuing each month thereafter, the Trustee and any of his legal counsel and accountants seeking payment for services rendered and

expenditures incurred shall file with the Court *in camera* and submit to the FDIC a detailed statement of the services rendered and expenditures incurred during the prior month. Any objection by the FDIC to payment of fees or reimbursement must be in writing and filed with the Court and served on the applicant and the Trustee within ten days from the date of service of the statement. If no objection is timely filed and served, the statement must nevertheless be approved by United States Magistrate Judge Arthur Nakazato before payment; if an objection is timely filed and served, then the Trustee shall request the Court to conduct a hearing forthwith concerning the disputed amount. Except for the initial Advance, the FDIC shall make no payment to the Trustee except upon approval of Judge Nakazato. All approved amounts shall be paid in the first instance by FDIC in thirty (30) days or as soon as practicable thereafter; however, in the event the FDIC obtains judgment in this case, it shall be entitled to seek reimbursement for such amounts from any money, assets or property subject to this Order. The Trustee shall provide to the Court a detailed statement of the services rendered and reasonable compensation therefor, and expenses incurred in connection therewith, upon the termination of his appointment as Trustee.

25. **IT IS FURTHER HEREBY ORDERED** that the Trustee shall prepare a monthly report to the Court which describes the status of money, assets and property subject to this Order and his activities with respect thereto, and upon the termination of his appointment the Trustee, shall submit a report to the Court regarding the status of the money, assets and property subject to this Order and his activities with respect thereto.

26. IT IS FURTHER HEREBY ORDERED that the Trustee is authorized to make payments, from the money, assets or property subject to this Order in his possession only (to the extent there is same), to counsel for Defendants Gerald Garner and Joan Garner or either of them, for their reasonable attorneys' fees and costs, in a sum not to exceed $10,000 per month without further Order of or review by this Court. Counsel for Defendants Gerald Garner and Joan Garner may apply for compensation from the Trustee for reasonable fees and expenses in an amount exceeding $10,000 per month by *in camera* application to Judge Nakazato, who shall determine whether any such application should be granted.

27. IT IS FURTHER HEREBY ORDERED that the following payments are authorized to be made from the money, assets or property subject to this Order only (to the extent there is same):

a. any existing mortgage indebtedness on any real property subject to this Order which is payable to any third party other than one of the Garner-Related Entities and not related to Gerald Garner or Joan Garner; and

b. any existing debt, whether or not secured by any other asset subject to this Order, and payable to a third party other than one of the Garner-Related Entities and not related to Gerald Garner or Joan Garner.

Upon presentation to the Trustee of satisfactory documentation that such a payment is due, the Trustee shall transfer to Gerald Garner and Joan Garner from the money subject to this Order (to the extent there is same) the amount of such payment, and Gerald Garner and Joan

Garner shall promptly make such payment and provide to the Trustee satisfactory evidence that such payment has been made.

28. **IT IS FURTHER HEREBY ORDERED** that the Trustee shall, from the money, assets or property subject to this Order only (to the extent there is same) pay $6,000 per month to Gerald Garner and Joan Garner for their reasonable and necessary living expenses.

29. **IT IS FURTHER HEREBY ORDERED** that any third party (other than Defendants Gerald Garner and Joan Garner or any of the Garner-Related Entities) who asserts any interest in any money, assets or property received or obtained by the Trustee pursuant to this Order may file and serve on the parties a declaration under penalty of perjury setting forth and including evidence in support of any such claim of interest, and after, in good faith, meeting and conferring with the affected parties to informally resolve same, if unsuccessful, shall be entitled to a hearing by this Court to determine whether the Trustee shall (a) remain in possession of such money, assets or property subject to the asserted claim of interest or (b) return such money, assets or property to the location from which it was received or obtained. Prior to any such hearing the affected parties may engage in such discovery as may be reasonably necessary for a full and fair adjudication of the third party's claim of interest.

30. **IT IS FURTHER HEREBY ORDERED** that any third party (other than Defendants Gerald Garner and Joan Garner or any of the Garner-Related Entities) who has any objection to the provisions of this Order requiring such third party to produce to the Trustee documents,

writings or records related to money, assets or property subject to this Order must serve a written objection on counsel for the Trustee, FDIC, and Defendants Gerald and Joan Garner within five (5) days after receipt of notice of this Order; within ten (10) days of service of the written objection, the affected parties shall, in good faith, meet and confer to informally resolve same; if the affected parties are unsuccessful in resolving said matter, the third party, within ten (10) days thereof, shall file a motion seeking judicial resolution of the objection. Pending resolution of such objection, the third party's production of such documents, writings and records shall be stayed so long as such third party timely complies with the procedures set forth in this paragraph, but the third party shall not destroy, alter, dispose of, secrete, or transfer to a different location any such documents, writings or records pending resolution of its objection.

31. **IT IS FURTHER HEREBY ORDERED** that this Order is and shall be effective immediately, and that no bond is required of Plaintiff.

32. **IT IS FURTHER HEREBY ORDERED** that the Trustee shall post a Trustee's bond in the amount of $1,000,000 and file it with the Clerk by five o'clock, p.m. on December 6, 1996.

33. **IT IS FURTHER HEREBY ORDERED** that the Trustee, in his discretion, may seek guidance from the Court on issues regarding the exercise of the powers and duties of his appointment. The Trustee further shall have the power, in his discretion, and with the approval of Judge Nakazato, to subpoena documents and witnesses.

The Trustee further shall have the power, in his discretion, to seek further orders from this Court in order to carry out his duties under and to enforce this Order. This Court shall retain jurisdiction to determine any claims or controversies arising out of the Trustee's (and/or his agents') exercise of his powers and duties pursuant to this Order, including, but not limited to, any controversy regarding compensation and expenses.

34. IT IS FURTHER HEREBY ORDERED that the FDIC is authorized to record a copy of this Order in the official records of all counties in which Defendants Gerald Garner or Joan Garner or any of the Garner-Related Entities own real property or interests in real property.

35. IT IS FURTHER HEREBY ORDERED that nothing herein shall prevent the FDIC from seeking to modify this Order so as to require any money, assets or property not listed on Exhibit A hereto to be turned over to the Trustee.

DATED: 12/3, 1996.

/s/ George H. King
GEORGE H. KING
UNITED STATES
DISTRICT JUDGE

EXHIBIT A
ART & JEWELRY

DESCRIPTION	TITLE	ARTIST	INDICATED VALUE	REFERENCE	INDICATED LOCATION
ACRYLIC	"BODY SHOP"	M. YOUNG	$5,500	88.65	LOCATED AT BURNING TREE
ACRYLIC	"KAWASAWA"	MARK KING	$15,500	88.5	LOCATED AT BURNING TREE
ACRYLIC	"YOKO"	R.C. GORMAN	$1,200	88.58	LOCATED AT BURNING TREE
ACRYLIC ON CANVAS	"FOURTH OF JULY"	SUSAN RIOS	$11,500	88.5	LOCATED AT BURNING TREE
ACRYLIC ON CANVAS	"PRIVATE THOUGHTS"	SUSAN RiOS	$17,500	88.5	LOCATED AT BURNING TREE
ARTWORK	"ALL SOULS (SAILS9) UP HAND MIRROR"	UNKNOWN	$2,300	88.65	LOCATED AT BURNING TREE
ARTWORK	"LES BYOUX DE PERLES"	UNKNOWN	$7,350	88.3	UNKNOWN

ARTWORK	"CIRCLES"	ALEXANDER CALDER	$17,000	88.71	LOCATED AT BURNING TREE
ARTWORK	"ROYAL SILVER"	AMERICO MAKK	$27,000	88.22	LOCATED AT IRONTREE
ARTWORK	"BONDED"	HILL MACK	$2,000	88.65	LOCATED AT BURNING TREE
ARTWORK	"SUITE"	BRAGO	$1,020	88.13	UNKNOWN
ARTWORK	"TWINS"	COOK	$700	88.74	UNKNOWN
ARTWORK	"WOODY - STUDY"	CUTRONE	$2,500	88.74	UNKNOWN
ARTWORK	"BRONZE MIRROR NARCISM"	ERTE	$4,100	88.72	UNKNOWN
ARTWORK	"CADENCE BRONZE DESK TOP MIRROR"	ERTE	$31,000	88.72	UNKNOWN
ARTWORK	"HEADRESS"	GREENBLATT	$4,500	88.71	LOCATED AT BURNING TREE
ARTWORK	"HUBAGALOO"	GREENBLATT	$1,800	88.24	UNKNOWN
ARTWORK	"TRAFFICVILLE TURNPIKE"	GREENBLATT	$6,000	88.24	UNKNOWN

ARTWORK	"WADING PAVILLION"	GREENBLATT	$1,800	88.24	UNKNOWN
ARTWORK	"LANDSCAPE WITH HUNTERS"	KING	$18,500	88.33	UNKNOWN
ARTWORK	"GREGO"	KOSTABI DRAWING	UNKNOWN	88.74	UNKNOWN
ARTWORK	"LINE DRAWING"	KUDO	$1,500	88.74	UNKNOWN
ARTWORK	"BEL AIRE"	MARK KING	$10,800	88.42	UNKNOWN
ARTWORK	"BADEN BADEN"	NEIMAN	$7,500	88.21	UNKNOWN
ARTWORK	"CHICAGO KBY CLUB"	NEIMAN	$4,500	88.21	UNKNOWN
ARTWORK	"FRANK LIZA & SAMMY"	NEIMAN	$5,000	88.21	UNKNOWN
ARTWORK	"THE MIXOLOGIST"	NEIMAN	$5,000	88.21	UNKNOWN
ARTWORK	"K MURETTO"	NICOLA SIMBARI	$24,000	88.71	LOCATED AT BURNING TREE

ARTWORK	"MISSING A MONEY SHOT"	RIZZI	$21,000	88.74	UNKNOWN
ARTWORK	"WHO GOT WINNERS"	RIZZI	$450	88.74	UNKNOWN
ARTWORK	"WOOBOZO-BR ASIC-SHUVA"	SCHARP	$6,200	88.24	UNKNOWN
ARTWORK	"AFTER THE THEATER"	SCHNEUR	$4,500	88.74	UNKNOWN
ARTWORK	"LOUVRE GARDEN"	YAMAGATA	$175,000	88.66	LOCATED AT BURNING TREE
BRONZE SCULPTURE	"FREE-MOTION"	UNKNOWN	UNKNOWN	13	UNKNOWN
BRONZE SCULPTURE	"PEARL DIVERS"	UNKNOWN	UNKNOWN	13	UNKNOWN
BRONZE SCULPTURE	"BALLET DANCER"	RICHARD SHILOH	$3,750	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"BEFORE THE MIRROR"	RICHARD SHILOH	$3,750	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"BOOK SCRIBE"	RICHARD SHILOH	$900	88.2	LOCATED AT IRONTREE

BRONZE SCULTURE	"DANCE OF THE GENGHIS KHAN"	RICHARD SHILOH	$2,925	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"L'APRES MIDI D'UM FUANE"	RICHARD SHILOH	$2,475	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"MOTHER & CHILD"	RICHARD SHILOH	$4,750	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"NATALIE"	RICHARD SHILOH	$3,750	88.2	LOCATED AT IRONTREE
BRONZE SCULPTURE	"RIBBON DANCER"	RICHARD SHILOH	$3,750	88.2	LOCATED AT IRONTREE
CHINESE INK ON SILK	"FRIENDLY FLYBY"	DAVID LEE	$3,300	88.23	LOCATED AT IRONTREE
CHINESE INK ON SILK	"PRECIOUS"	DAVID LEE	$3,300	88.23	LOCATED AT IRONTREE
ARTWORK	"NEW YORK, NEW YORK"	ERTE	$3,200	88.1	UNKNOWN
ARTWORK	"PERFUME"	ERTE	$5,000	88.1	UNKNOWN
ARTWORK	"SLAVE"	ERTE	$3,000	88.1	UNKNOWN

HALL VASE	"IMPERIALKILN ANTIQUE BUTTERFLY PORCELAIN HALL VASE"	UNKNOWN	$2,750	88.1	LOCATED AT IRONTREE
INK	"1984"	KEITH HARING	$25,000	88.48	LOCATED AT BURNING TREE
LITHOGRAPH	"BALLOONS"	CALDOR	APPRAISED AT $300	88.2	LOCATED AT IRONTREE
LITHOGRAPH	"LADY"	ERTE	$1,200	88.2	LOCATED AT IRONTREE
LITHOGRAPH	"HOLLYWOOD BOULEVARD"	MELANIE TAYLOR KENT (191/300)	$3,000	88.2	LOCATED AT IRONTREE
LITHOGRAPH	"CASA LUPITA (162/250)"	NAGEL	$800	88.2	LOCATED AT IRONTREE
LITHOGRAPH	"WASSERMAN'S LADY"	NAGEL	$600	88.2	LOCATED AT IRONTREE
LITHOGRAPH	"MEL"	TANKAY	$1,000	88.74	UNKNOWN
LITHOGRAPH	"TROLLEY CAR (68/250)"	WAYLAND MOORE	$300	88.2	LOCATED AT IRONTREE

LITHOGRAPH	"XXXV/C CLUB BAHAMAS"	YAMAGATA	$2,700	88.2	LOCATED AT IRONTREE
ARTWORK	"CINDERELLA"	ERTE	$7,000	88.28	UNKNOWN
ARTWORK	"LADY WITH ORCHID"	NAGEL (SIGNED & UNDER GLASS)	$4,500	88.1	LOCATED AT IRONTREE
OIL PAINTING	"UNKNOWN"	LEROY NEIMAN	$50,000	88.5	LOCATED AT BURNING TREE
OIL PAINTING	"EN EL CAFE"	ALDO LUONGO	$45,000	88.23	LOCATED AT IRONTREE
OIL PAINTING	"DOUBLE TROUBLE"	ALEXIS ALLEN	$12,000	88.43	LOCATED AT BURNING TREE
OIL PAINTING	"FALLING FOR YOU"	ALEXIS ALLEN	$10,000	88.43	LOCATED AT BURNING TREE
OIL PAINTING	"TRIPLE HEADER"	ALEXIS ALLEN	$4,000	88.43	LOCATED AT IRONTREE
OIL PAINTING	"WHICH ONE KNOWS"	ALEXIS ALLEN	$4,000	88.43	LOCATED AT IRONTREE

OIL PAINTING	"NUDE"	ALVAR	APPRAISED VALUE $42,000	88.37	UNKNOWN
OIL PAINTING	"THE NUDES"	ALVAR	$40,000	88.67	LOCATED AT BURNING TREE
OIL PAINTING	"CAMPBELL BOX"	ANDY WARHOL	$60,000	88.67	LOCATED AT BURNING TREE
OIL PAINTING	"ENFANTS"	BOULANGER	$21,000	88.72	UNKNOWN
OIL PAINTING	"ADAM & EVE"	CAROL JABLONSKY	$5,000	88.79	UNKNOWN
OIL PAINTING	"LE FANTHIL ROTIN"	CASSIGNEU	$38,000	88.72	UNKNOWN
OIL PAINTING	"UNCLE SAM"	CHARLES BRAGG	$8,000	88.79	UNKNOWN
OIL PAINTING	"ARC DE TRIUMPH"	DELACROIX	$40,000	88.48	LOCATED AT BURNING TREE
OIL PAINTING	"PARIS"	DELACROIX"	$8,000	88.79	UNKNOWN
OIL PAINTING	"STATUE OF LIBERTY"	DELACROIX	$40,000	88.79	UNKNOWN

OIL PAINTING	"UNITY & ROSE"	GREENBLATT	$10,000	88.72	UNKNOWN
OIL PAINTING	"WHITE FENCE"	HAROLD BEHRANS	$21,000	88.2	LOCATED AT IRONTREE
OIL PAINTING	"CHIARO DE LUNA"	IMPLIGLIA	$6,000	88.72	UNKNOWN
OIL PAINTING	"STEAMSHIP"	JOHN KELLY	$11,000	88.23	LOCATED AT IRONTREE
OIL PAINTING	"MORNING LIGHT"	KING	$12,000	88.12	UNKNOWN
OIL PAINTING	"CELTICS-KNICKS"	LEROY NEIMAN	$50,000	88.72	UNKNOWN
OIL PAINTING	"HAUTE CUISINE II (SUPREME)"	LEROY NEIMAN	$55,000	88.5	LOCATED AT BURNING TREE
OIL PAINTING	"HAUTE CUISINE"	LEROY NEIMAN	$39,000	88.5	LOCATED AT BURNING TREE
OIL PAINTING	"PLAYBOY COVER"	LEROY NEIMAN	$30,000	88.67	LOCATED AT BURNING TREE
OIL PAINTING	"RESTAURANT IN BLUE"	LEROY NEIMAN	$35,000	88.16	LOCATED AT IRONTREE

OIL PAINTING	"TIBERIO"	LEROY NEIMAN	$65,000	88.17	UNKNOWN
OIL PAINTING	"BONDAGE"	MARK KOSTABI	$4,500	88.72	UNKNOWN
OIL PAINTING	"MTV"	MARK KOSTABI	$9,500	88.72	UNKNOWN
OIL PAINTING	"STANE DE LA LIBERTE AU-DESSUS"	MICHAEL DELACROIX	APPRAISED VALUE $41,000	88.35	UNKNOWN
OIL PAINTING	"TRATTORIA TERRAZA"	NEIMAN	$50,000	88.18	UNKNOWN
OIL PAINTING	"BLUSHING BEAUTY"	PETER MAX	$25,000	88.38	LOCATED AT IRONTREE
OIL PAINTING	"GORBY (GORBA-CHEV?)"	PETER MAX	APPRAISED VALUE $20,000	88.4	LOCATED AT IRONTREE
OIL PAINTING	"THE COUPLE"	PETER MAX	$70,860	88.72	UNKNOWN
OIL PAINTING	"DAY AT THE BEACH"	RANUCCI	$6,000	88.67	LOCATED AT BURNING TREE

OIL PAINTING	"RECLINING"	SALINAS	$6,000	88.67	LOCATED AT BURNING TREE
OIL PAINTING	"DOUBLE ANTENDRAS"	SCHARF	$16,500	88.72	UNKNOWN
OIL PAINTING	"GIRL ON WINDY BEACH"	SIMBARI	$18,000	88.72	UNKNOWN
OIL PAINTING	"THE NUDE"	SIMBARI	$16,500	88.72	UNKNOWN
OIL PAINTING	"DAY DREAMING"	SUSAN RIO	$18,000	88.67	LOCATED AT BURNING TREE
OIL PAINTING	"COMPANIONS HIP"	TARKAY	$13,000	88.72	UNKNOWN
ORIGINAL OIL	"LE REPAS"	UNKNOWN	$25,000; APPRAISED VALUE $40,000	88.29 AND88.36	UNKNOWN
PAINTING	"COUPLE IN BOOTH"	LEROY NEIMAN	$65,000	88.63	LOCATED AT BURNING TREE
PAINTING	"MIRABELLE'S"	LEROY NEIMAN	$100,000	88.63	LOCATED AT BURNING TREE

PAINTING	"PICKWICK CLUB"	LEROY NEIMAN	$100,00	88.63	LOCATED AT BURNING TREE
PAINTING	"MOTHER & CHILD"	TANO DA KANO	$13,500	88.2	LOCATED AT IRONTREE
PASTEL ON RICE PAPER	"SUMMER STORM"	ANCA IONESCU	$12,500	88.2	LOCATED AT IRONTREE
PORCELAIN	"CYBIS COLLECTION"	UNKNOWN	$12,500	88.4	LOCATED AT IRONTREE
SCULPTURE	"COURT OF APPEALS"	BRAGG	$3,300	88.65	LOCATED AT BURNING TREE
SCULPTURE	"MIDAS TOUCH"	BRAGG	$3,300	88.65	LOCATED AT BURNING TREE
SCULPTURE	"OUT OF COURT SETTLEMENT"	BRAGG	$3,300	88.65	LOCATED AT BURNING TREE
SCULPTURE	"FEATHER GOWN"	ERTE	$4,000	88.72	UNKNOWN
SCULPTURE	"PERFECTA MOODSKY"	KENNY SCHARF	$11,000	88.72	UNKNOWN

SCULPTURE	"112 DALMATIANS II (75/112)"	PRESCOTT	$2,850	88.53	UNKNOWN
SCULPTURE	"BIG BOSS"	YAMAGATA	$9,000	88.5	LOCATED AT BURNING TREE
SUMI INK	"UNTITLED"	KEITH HARNG	$25,000	88.5	LOCATED AT BURNING TREE
WATER-COLOR	"TREE OF LIFE"	CUTRONE	$5,500	88.5	LOCATED AT BURNING TREE
WATER-COLOR	"SUMMER HATS"	YAMAGATA	$7,500	88.5	LOCATED AT BURNING TREE
ARTWORK	"SATCHMO"	NEIMAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"JUNG JUNGLE"	UNKNOWN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"UNKNOWN"	BOULANGER	UNKNOWN	I-21	UNKNOWN
ARTWORK	"DOWN HILL RACER"	VASARELLI	UNKNOWN	I-21	UNKNOWN
ARTWORK	"VCR"	UNKNOWN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"TRANSCEN-DENCE"	ERTE	UNKNOWN	I-21	UNKNOWN

ARTWORK	"GAUCHE"	ERTE	UNKNOWN	I-21	UNKNOWN
ARTWORK	"3 A'S"	ALLENS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"GOLF GAME"	ALLENS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SWIMMING"	ALLENS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"IL MURETTO"	SIMBARI	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SIXTH DAY"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"ART CRITIC"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"AMERICAN FLAG"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CANDIDATE"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"PRINCELY"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"FELIX THE CAT"	BRAGG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CITY VIEW"	DE LACROIX	UNKNOWN	I-21	UNKNOWN
ARTWORK	"INK SKETCH"	DE LACROIX	UNKNOWN	I-21	UNKNOWN

ARTWORK	"ABSTRACT (TITLE OR DESCRIP-TION7)"	GREENBLATT	UNKNOWN	I-21	UNKNOWN
ARTWORK	"ABSTRACT (TITLE OR DESCRIP-TION7)"	GREENBLATT	UNKNOWN	I-21	UNKNOWN
ARTWORK	"GREENFPOG"	GREENBLATT	UNKNOWN	I-21	UNKNOWN
ARTWORK	"PORTRAIT"	BRENT HAYES	UNKNOWN	I-21	UNKNOWN
ARTWORK	"MICHAEL CHIANG"	BRENT HAYES	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NOAH'S ARK"	JABLONSKI	UNKNOWN	I-21	UNKNOWN
ARTWORK	"FIDDLER"	JABLONSKI	UNKNOWN	I-21	UNKNOWN
ARTWORK	"ENTRY FORM"	HERRON	UNKNOWN	I-21	UNKNOWN
ARTWORK	"UNKNOWN (TITLE OF DESCRIP-TION7)"	JIANG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"FREIGHTER"	KELLY	UNKNOWN	I-21	UNKNOWN

ARTWORK	"HONG KONG JUNK"	PASTEL	UNKNOWN	I-21	UNKNOWN
ARTWORK	"FISHING BOATS"	PASTEL	UNKNOWN	I-21	UNKNOWN
ARTWORK	"LADY IN CAR"	KHODOR-KOWS KY	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SAPPORO GOLF"	KING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"BELAIN GOLF"	KING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"ELEPHANT"	KING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"BOULEVARD CAFE"	KING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SUNRISE"	KING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"1 NUDE"	KUDO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"2 NUDE"	KUDO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SELF PORTRAIT"	LOUNGO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NUDE"	LOUNGO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NUDE IN CHAIR"	MAKK	UNKNOWN	I-21	UNKNOWN

ARTWORK	"WAIST UP"	MAKK	UNKNOWN	I-21	UNKNOWN
ARTWORK	"POLO PLAYER"	NEIMAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CHUCK WEPNER"	NIEMAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CITY IN SKY"	NEIMAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NIGHT MOVES"	PERGOLA	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SIDEWALK CAFE"	PIGOT	UNKNOWN	I-21	UNKNOWN
ARTWORK	"DREAMING"	RIOS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"MARGARET JEAN"	RIOS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NUDE"	SALINAS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"STILL LIFE STRAW-BERRIES"	AMERY	UNKNOWN	I-21	UNKNOWN
ARTWORK	"PAWN SHOP"	BALLET	UNKNOWN	I-21	UNKNOWN
ARTWORK	"LAST RACE"	BEHRENS	UNKNOWN	I-21	UNKNOWN

ARTWORK	"HONG KONG HARBOR"	TIN YAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NUDE IN CHAIR"	TOMAIO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"SISTERS"	TOMAIO	UNKNOWN	I-21	UNKNOWN
ARTWORK	"LE FLEUR"	VASERELLI	UNKNOWN	I-21	UNKNOWN
ARTWORK	"VERSAILLES"	YAMAGATA	UNKNOWN	I-21	UNKNOWN
ARTWORK	"WINDOW"	YAMAGATA	UNKNOWN	I-21	UNKNOWN
ARTWORK	"EVERGLADES"	GINZBURG	UNKNOWN	I-21	UNKNOWN
ARTWORK	"DOCK"	SALINAS	UNKNOWN	I-21	UNKNOWN
ARTWORK	"2 CHILDREN"	SCHERING	UNKNOWN	I-21	UNKNOWN
ARTWORK	"NUDE"	SAADRAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CAROUSEL"	SAADRAN	UNKNOWN	I-21	UNKNOWN
ARTWORK	"CAFE AT NIGHT"	TARKAY	UNKNOWN	I-21	UNKNOWN
ARTWORK	"BY THE WHITE FENCE"	BEHRENS	UNKNOWN	I-21	UNKNOWN
JEWELRY	"10K DIAMOND DROP"			88.5	

JEWELRY	"7k DIAMOND RING"	88.5
JEWELRY	"3 STONE DIAMOND RING COMPOSED OF STONES 3K, 4K AND 5K"	88.5
JEWELRY	"BBUMB MERCIA WATCH APPRAISED AT $3,700"	88.8
JEWELRY	"DIAMOND EARRINGS APPRAISED AT $10,000"	88.8
JEWELRY	"DIAMOND EARRINGS APPRAISED AT $4,000"	88.8

JEWELRY	"DIAMOND EARRINGS APPRAISED AT $9,500"	88.8
JEWELRY	"DIAMOND NECKLACE W/96 DIAMONDS"	88.5
JEWELRY	"DIAMOND PAVE EARRINGS"	88.5
JEWELRY	"DIAMOND RING APPRAISED AT $53,000"	88.8
JEWELRY	"DIAMOND SOLITAIRE APPRAISED AT $45,000"	88.8
JEWELRY	"EMERALD BRACELET APPRAISED AT $12,772"	88.8

JEWELRY	"EMERALD EARRINGS APPRAISED AT $4,800"	88.8
JEWELRY	"EMERALD RING APPRAISED AT $3,345"	88.8
JEWELRY	"LADIES BRACELET APPRAISED AT $18,750"	88.8
JEWELRY	"LADIES BRACELET APPRAISED AT $9,640"	88.8
JEWELRY	"LADIES ETERNITY BAND APPRAISED AT $9,000"	88.8

JEWELRY	"LADIES FLEXIBLE DIAMOND NECKLACE APPRAISED AT $63,620"	88.8
JEWELRY	"LADIES NECKLACE APPRAISED AT $57,820"	88.8
JEWELRY	"LADIES PUEGOT POLO WATCH APPRAISED AT $7,500"	88.8
JEWELRY	"LADIES RING APPRAISED AT $125,000"	88.8
JEWELRY	"LADIES RING APPRAISED AT $7,250"	88.8

JEWELRY	"NATURAL EMERALD RING APPRAISED AT $16,000"	88.8
JEWELRY	"TANZANITE STONE APPRAISED AT $44,352"	88.8
JEWELRY	"TENNIS BRACELET APPRAISED AT $26,000"	88.8
JEWELRY	"TREE OF LIFE PIN WITH 5 DIAMONDS EACH APPROX 1K"	88.5
JEWELRY	"WOMEN'S DIAMOND RING APPRAISED AT $210,870"	88.8

JEWELRY	"YELLOW GOLD DIAMOND RING APPRAISED AT $40,000"	88.8
JEWELRY	"YELLOW GOLD RING APPRAISED AT $12,000"	88.8
JEWELRY	"LADIES PRESIDENT ROLEX WATCH"	I-21
JEWELRY	"26 CARAT SAPPHIRE-RING"	I-21
JEWELRY	"DIAMOND RING - GERALD'S"	I-21
JEWELRY	"ROLEX WATCH - GERALD'S"	I-21

JEWELRY	"GOLD BRACELET - GERALD'S"	I-21
JEWELRY	"ROLEX WATCH - JOAN'S"	I-21
JEWELRY	"10K ENGAGEMENT RING"	I-21
JEWELRY	"29 K BLUE SAPPHIRE RING"	I-21

12 U.S.C. § 1821(d):

(17) Fraudulent transfers

(A) In general

The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision may avoid a transfer of any interest in an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery

To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from –

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee

The Corporation or any conservator described in subparagraph (A) may not recover under subparagraph (B) from –

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph

The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under Title 11.

(18) Attachment of assets and other injunctive relief

Subject of paragraph (19), any court of competent jurisdiction may, at the request of –

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 1821, 1822, or 1823 of this title); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision,

issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards

(A) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damages is irreparable and immediate.

(B) State proceeding

If, in the case of any proceeding in a State court, the court determines the rules of civil procedure available under the laws of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph (18) may be requested under the laws of such State.

Rule 65, F.R.C.P.

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the

clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(2)

Supreme Court, U.S.
FILED
FEB 10 1998
OFFICE OF THE CLERK

No. 97-982

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD GARNER AND JOAN GARNER, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC) must allege that defendants engaged in fraudulent conduct in order to obtain a preliminary injunction under 12 U.S.C. 1821(d)(18) and (19) to preserve the assets of defendants in a suit for damages arising from wrongful banking activities.

2. Whether the court of appeals erred in finding that the injunction against defendants entered by the district court was neither punitive nor overbroad.

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In the Supreme Court of the United States

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No. 97-982

GERALD GARNER AND JOAN GARNER, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 125 F.3d 1272. The order of the district court (Pet. App. 23a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (Taxpayer Recovery Act or TRA), Pub. L. No. 101-647, § 2521, 104 Stat. 4863, amended the Federal Deposit

Insurance Act (FDIA), 12 U.S.C. 1811 *et seq.*, to alter the standards by which the Federal Deposit Insurance Corporation (FDIC or Corporation) may obtain preliminary injunctive relief during the pendency of a lawsuit to recover losses resulting from the wrongdoing of former bank officers and directors. Section 1821(d)(18) of the FDIA (as added by the TRA) provides that any court of competent jurisdiction may, at the FDIC's request:

> issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation * * * under the control of the court and appointing a trustee to hold such assets.

12 U.S.C. 1821(d)(18). Section 1821(d)(19) further provides, that, in any proceeding under Section 1821(d)(18), Rule 65 of the Federal Rules of Civil Procedure "shall apply * * * without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate." 12 U.S.C. 1821(d)(19)(A). Section 1821(d)(17) of the FDIA (which was added by a separate provision of the TRA) additionally authorizes the FDIC, in certain circumstances, to avoid asset transfers and to recover assets transferred "with the intent to hinder, delay, or defraud." 12 U.S.C. 1821(d)(17).

2. a. Until 1993, when the Office of the Comptroller of the Currency closed American Commerce National Bank (ACNB) as unsafe and unsound, petitioner Gerald Garner served as Chairman of ACNB's Board of Directors and its Chief Executive Officer. Pet. App. 3a. His wife, petitioner Joan Garner, was a member of the Board of Directors as well as one

of ACNB's principal borrowers. *Ibid.* In 1996, the FDIC, as ACNB's receiver, brought suit against petitioners, along with certain other former directors and officers, to recover more than $10 million of losses sustained as a result of imprudent loans, self-dealing, and other insider abuses. *Id.* at 3a-4a. In July 1996, relying on Section 1821(d)(18) and (19), the FDIC applied to the district court for an *ex parte* temporary restraining order freezing petitioners' assets and appointing a temporary trustee, as well as for an order to show cause why a preliminary injunction should not issue.

The FDIC submitted two lengthy affidavits in support of its application. Pet. App. 4a. The affidavits, accompanied by nearly 200 exhibits, detailed extensive evidence of wrongdoing by petitioners from which they had personally benefited. The affidavits also described numerous secretive and unusual business practices, including petitioners' failure to disclose substantial assets in response to FDIC subpoenas, as well as over 50 instances of asset transfers between family members and related business entities, which demonstrated the basis for the FDIC's concern that petitioners would dissipate their assets during the pendency of the lawsuit. *Id.* at 5a-6a.

b. The district court initially declined to rule on the FDIC's application. Although satisfied that the FDIC had shown a likelihood of success on the merits of its breach of fiduciary duty and negligence claims, the court requested further briefing on the legal basis for the injunctive relief. After the FDIC supplemented its legal arguments, the district court denied the application without prejudice, finding that, although the FDIC had shown a substantial risk of asset dissipation, it could not invoke Section

1821(d)(18) and (19) in the absence of allegations of fraud or of fraudulent conveyance claims under Section 1821(d)(17). Pet. App. 6a.

3. In August 1996, the FDIC once again applied for injunctive relief, reasserting entitlement to the requested relief under Section 1821(d)(18) and (19), as well as under traditional standards for injunctive relief. In October 1996, the district court granted the FDIC's proposed temporary restraining order. After a show cause hearing, the court found that the FDIC had shown both a likelihood of success on the merits and the possibility of asset dissipation. The court explained that, despite its initial misgivings, it was convinced after further research that the plain language of Section 1821(d)(18) and (19) authorized the asset freeze. Concerned that the order be narrowly drawn, the court required the parties to negotiate the terms of the asset freeze and to submit a proposed order. Pet. App. 7a. On December 3, 1996, the court entered a Preliminary Injunction and Order Appointing a Trustee and required petitioners to turn over certain property to the trustee by December 10, 1996. *Id.* at 8a, 32a.

4. On December 6, 1996, the court of appeals denied petitioners' application for an emergency stay of the order. Rather than comply with the injunction, however, petitioners filed a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code. On January 23, 1997, the district court entered an order in the bankruptcy proceeding appointing a trustee, making the asset freeze injunction subject to the automatic stay provisions of 11 U.S.C. 362(a), and modifying the Chapter 11 automatic stay to permit petitioners' appeal of the asset freeze order. Pet. App. 8a.

5. The court of appeals affirmed the asset freeze injunction and order appointing a trustee. Pet. App. 1a-21a. The court rejected petitioners' contention, based on the decision in *FDIC* v. *Floyd*, 827 F. Supp. 409 (N.D. Tex. 1993), that Section 1821(d)(18) and (19) applies only in cases in which the FDIC alleges fraud. Pet. App. 13a. The court emphasized that the text of Section 1821(d)(18) and (19) contains neither a fraud requirement nor any cross-reference to the Section 1821(d)(17) provisions authorizing the FDIC to avoid fraudulent asset transfers. *Id.* at 13a-14a. The court also noted that the legislative history does not indicate any intent to bar the use of injunctive relief in the absence of fraud. *Id.* at 15a n.1. Refusing to read a fraud limitation into Section 1821(d)(18) based solely on its proximity to Section 1821(d)(17), the court held that the FDIC may apply the injunctive relief provisions in cases in which the FDIC has not alleged fraud but instead seeks recovery of losses arising from other illegal or wrongful banking activities. *Id.* at 14a-16a.

Deferring to the district court's factual findings, the court of appeals found that the FDIC's showing of a likelihood of success on the merits and the possibility of asset dissipation satisfied Rule 65 requirements, as modified by Section 1821(d)(19). Pet. App. 16a-18a. Finally, the court of appeals concluded, after noting the district court's careful paragraph by paragraph review of the preliminary injunction provisions, as well as petitioners' participation in the order's drafting, that the injunction was neither overbroad nor in violation of petitioners' due process rights. *Id.* at 19a.

ARGUMENT

The court of appeals correctly held that the FDIC is entitled to the requested injunctive relief under the plain language of Section 1821(d)(18) and (19) of the FDIA. Contrary to petitioners' assertion, the court of appeals' determination that the statutory injunction provisions apply in the absence of allegations of fraud does not conflict with the decision of any other court of appeals. Petitioners' further claim that the injunction is overbroad and punitive is without merit, fact-bound, and does not implicate any important question of federal law. Accordingly, review by this Court is not warranted.

1. a. Petitioners argue (Pet. 11-19) that this Court should grant certiorari to resolve a conflict among the courts of appeals on the issue whether the asset freeze provisions apply in the absence of allegations of fraud. Petitioners contend (Pet. 10, 13) that the court of appeals' decision in this case conflicts with decisions of the First, Second, Fifth, and Tenth Circuits because each of those courts of appeals has applied Section 1821(d)(17)-(19) "as a package." This case, however, presents no conflict among the courts of appeals. Indeed, no other court of appeals has addressed the issue that petitioners press.

The courts of appeals decisions cited by petitioners to demonstrate a conflict never ruled on the question whether Section 1821(d)(18) permits an asset freeze injunction in the absence of fraud allegations because each of those cases involved either fraudulent transfers or fraud prosecutions. See *FDIC* v. *Elio*, 39 F.3d 1239, 1243 (1st Cir. 1994); *FDIC* v. *Faulkner*, 991 F.2d 262, 264 (5th Cir. 1993); *In re Colonial Realty Co.*, 980 F.2d 125, 127 (2d Cir. 1992); *RTC* v. *Cruce*, 972

F.2d 1195, 1197 (10th Cir. 1992).[1] Moreover, in applying the asset freeze provisions to cases of illegal activities in addition to fraud, the court of appeals did not dispute that "subsections (17)-(19) are often used as a package" because injunctive relief is an effective weapon for avoiding the fraudulent transfers contemplated by Section 1821(d)(17). Pet. App. 14a.

Because this case is the first one before any court of appeals in which the FDIC has invoked the asset freeze provisions to prevent dissipation of assets by persons charged with benefiting from wrongdoing other than fraud, its holding is not in conflict with the decision of any other court of appeals, and no further review is warranted. Further, the Ninth Circuit's rejection of the flawed reasoning of the district court in *FDIC* v. *Floyd*, 827 F. Supp. 409 (N.D. Tex. 1993), the case upon which petitioners principally rely (Pet. 12-13), creates no conflict requiring resolution by this Court.[2] Compare Sup. Ct. R. 10(a) (conflict with "other court of appeals" is a reason to grant certiorari).

b. The court of appeals correctly interpreted Section 1821(d)(18) to authorize injunctive relief without any requirement of fraud allegations. In keeping with basic principles of statutory construction, the court both began and ended its analysis with the plain

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[1] Several of the district court cases relied on by petitioners similarly involved alleged fraud. See *FDIC* v. *Hinch*, 879 F. Supp. 1099, 1101 (N.D. Okla. 1995); *NCUA Board* v. *Concord Limousine, Inc.*, 872 F. Supp. 1174, 1175 (E.D.N.Y. 1995); *RTC* v. *Spagnoli*, 811 F. Supp. 1005, 1013 (D.N. J. 1993).

[2] *Resolution Trust Corporation* v. *Gershman*, 829 F. Supp. 1095, 1103 (E.D. Mo. 1993), is distinguishable from the present case because, in that case, the RTC did not allege that the defendant benefitted in any way from the alleged wrongdoing.

language of the statute. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (When a statute's language is clear, "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995) ("In the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, [the Court's] obligation is to apply the statute as Congress wrote it.").

Section 1821(d)(18) provides, in unambiguous terms, that, at the FDIC's request, a court may issue an order placing the assets of "any person designated by the [FDIC]" under the court's control. Nothing in the language of the statute requires that fraud allegations be made or proven before an asset freeze may be ordered. The court of appeals correctly concluded that, in the absence of any cross-reference to the provisions in Section 1821(d)(17) authorizing the FDIC to void fraudulent transfers, the mere fact that paragraphs (18) and (19) follow paragraph (17) in the United States Code does not imply that the authority granted in paragraphs (18) and (19) can be exercised only in cases involving a fraudulent asset transfer. Pet. App. 14a.[3] The Ninth Circuit properly refused to rewrite the plain language of the statute to impose such a limitation.

Unable to anchor their interpretation of Section 1821(d)(18) in the text of that Section or in its proxi-

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[3] Indeed, although paragraphs (17), (18), and (19) were codified one after the other (as the newest additions to the subsection of the code cataloguing various powers of the FDIC), paragraphs (18) and (19) were enacted together by Section 2521 of the TRA, while paragraph (17) was enacted by Section 2528. See 104 Stat. 4863-4864, 4877-4878.

mity to a separate provision, petitioners base (Pet. 19-24) their restrictive reading solely on the legislative history of the Taxpayer Recovery Act. Their resort to the legislative history is unavailing, however. This Court has consistently held that there is no reason to use legislative history to construe straightforward statutory language. *United States* v. *Gonzales*, 117 S. Ct. 1032, 1035-1036 (1997); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Even if the legislative history were relevant, the legislative history does not support the fraud limitation urged by petitioners.

As the court of appeals acknowledged, the legislative history indicates that fraud was the primary target of the law. Pet. App. 15a n.1. Nevertheless, "the record provides nothing to indicate that Congress contemplated barring the use of these provisions in the absence of fraud," *ibid.*, and the court of appeals properly saw no basis in the legislative history for finding ambiguity in otherwise plain statutory language. See *Brogan* v. *United States*, No. 96-1579 (Jan. 26, 1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself.").[4]

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[4] Petitioners point (Pet. 22-23) to an amendment that never passed as evidence that Congress intended to limit the FDIC's injunctive powers under paragraphs (18) and (19) to situations involving fraud. They incorrectly contend (Pet. 23) that the interpretation of the court of appeals would "nullify the rejection of this proposed amendment." "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the

2. Petitioners also argue (Pet. 24-28) that the Court should grant certiorari because the court of appeals rejected their claim that the district court's injunction order was overbroad and punitive. That fact-bound claim does not warrant review. As in the court of appeals, petitioners here offer neither statutory nor case law in support of their argument. The court of appeals properly deferred to the district court's detailed findings concerning the asset freeze injunction, noting that they were made after the court's paragraph by paragraph review of the proposed injunction, which petitioners participated in drafting. Pet. App. 19a. Unable to find clear error in the district court's carefully considered findings, the court of appeals correctly affirmed the district court's order. The court of appeals' determination that the facts supported the district court's asset freeze order presents no issue worthy of this Court's review.

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inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted). In this case, in any event, the amendment cited by petitioners would have applied only to situations involving fraud, so Congress's action on the amendment one way or the other reveals little, if anything, about Congress's intent in situations that do not involve fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-982

In The

Supreme Court of the United States

October Term, 1997

GERALD GARNER and JOAN GARNER,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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10 pp

LIST OF PARTIES TO THE PROCEEDING AND LIST OF ALL PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

The list required by this Rule has already been provided in the Petition for Writ of Certiorari, filed on or about December 10, 1997.

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Sup. Ct. R. 10(c) 1

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Gerald Garner and Joan Garner hereby submit this brief in reply to the "Brief for the Respondent in Opposition" ("Opposition") filed by the Federal Deposit Insurance Corporation ("FDIC").

This case alleges purported negligence, not intentional wrongdoing, by former directors and one officer of a seized bank. No allegations of fraud or fraudulent conveyances are made in the Complaint. No allegations are made of embezzlement or conversion of bank assets. No criminal proceeding has been initiated. No bank assets are alleged to be missing. All of the transactions on which the FDIC is suing were amply documented in the bank's records.

The FDIC states, "Because this case is the first one before any court of appeals in which the FDIC has invoked the asset freeze provisions to prevent dissipation of assets by persons charged with benefiting from wrongdoing other than fraud, its holding is not in conflict with the decision of any other court of appeals, and no further review is warranted." (Opposition, p. 7.) Putting aside the fact that this rationale in and of itself would be a reason to grant certiorari under Sup. Ct. R. 10(c), because it involves an important question of federal law which should be settled by this Court, the FDIC is simply wrong in its reasoning. Notably, also, the FDIC has now changed its argument 180 degrees from its original briefs on this matter submitted to the trial court. As set forth in detail in petitioners' opening brief, the decision of the court of appeals is squarely in conflict with all of the other courts

which have considered the issue of whether 12 U.S.C. § 1821(d), subsection (18) and (19) ("Sections 18 and 19"), can be invoked in the absence of allegations of fraud, fraudulent conveyances, or criminal conduct. To ensure uniformity among the lower courts, and to stop outrageous abusiveness by a government agency, this Court should grant certiorari.

Like the instant case, *FDIC v. Floyd*, 827 F. Supp. 409, 412-414 (N.D. Tex. 1993) ("*Floyd*") involved "the dissipation of assets by persons charged with benefiting from wrongdoing other than fraud." In that case, the FDIC sought a preliminary injunction to freeze the defendant's assets for the purpose of collecting on a promissory note. The defendant had shipped his assets abroad to Lichtenstein, presumably for the express purpose of avoiding seizure; a clearer case of dissipation of assets could hardly be imagined. Moreover, there were allegations of criminal conduct, as the defendant was already a party to a criminal proceeding. Nevertheless, the *Floyd* court refused to allow the assets to be seized under Sections 18 and 19, finding that in all cases in which Sections 18 and 19 had been invoked, "the underlying suit involved, at least in part, allegations of fraud," (827 F. Supp. at 412.) The court stated, in pertinent part:

> In this suit, the FDIC argues that to restrain Floyd's funds it must show only
>
> (1) a substantial likelihood of recovery on the promissory note; (2) the equities weigh in its favor; and (3) that the public interest would not be disserved by issuance of a preliminary injunction. If such were the case, the FDIC would be required to show neither irreparable

> harm nor fraudulent conduct to obtain a preliminary injunction in a simple action for damages at law. The Court cannot agree with such a premise.

827 F. Supp. at 412-413. The *Floyd* court concluded that a petition for a preliminary injunction brought under Sections 18 and 19 "must include a showing of fraudulent conduct. Otherwise, the statute operates to afford Draconian relief to the FDIC under everyday circumstances." 827 F. Supp. at 414.

The *Floyd* court expressly relied on two decisions of two different courts of appeals: *FDIC v. Faulkner,* 991 F.2d 262 (5th Cir. 1993) ("*Faulkner*") and *Resolution Trust Corporation v. Cruce,* 972 F.2d 1195 (10th Cir. 1992) ("*Cruce*"). In its August 15, 1996 order, the trial court had correctly interpreted these cases as linking relief under Sections 18 and 19 to the presence of a fraudulent conveyance claim under 12 U.S.C. § 1821(d)(17) ("Section 17"). (Exc. 50, CR 50, p. 4.)

A year after *Floyd* and *Faulkner* were decided, a third court of appeals decided in *FDIC v. Elio,* 39 F.3d 1239 (1st Cir. 1994) that the validity of the preliminary injunction granting an attachment in that case and appointing a trustee was "by no means separable from the merits of the FDIC's fraudulent conveyance claims." 39 F.3d at 1249.

At the hearing on the preliminary injunction in this case, both the trial court and the FDIC conceded that *Floyd* was "on all fours" with the instant case. (R.T., Exc. H, p. 6, lines 24-25.) Another case which is equally "on all

fours" is *Resolution Trust Corporation v. Gershman*, 829 F. Supp. 1095 (E.D. Mo. 1993). In that case, as in the instant case, the plaintiff as receiver for a seized financial institution sued former directors and officers of the institution for negligence, gross negligence, and breach of fiduciary duty – but not fraud or conduct amounting to fraud – and sought an accounting of all transfers of interests in property made by the defendants, all assets held by the defendants, and all liabilities incurred by the defendants in the five years prior to the appointment of the receiver. The plaintiff further requested, pursuant to Sections 18 and 19, that the court set aside any transfers made and liabilities incurred with the intent to hinder, delay or defraud the institution. In effect, the plaintiff sought to freeze any assets which could be used to satisfy a judgment, as in the instant case.

The *Gershman* court stated, in pertinent part:

> Courts have ordered equitable relief pursuant to 12 U.S.C. § 1821(d)(18) where there was a substantial likelihood that the moving party could prove that the defendant had made fraudulent transfers, *Federal Deposit Insurance Corp. v. Cafritz*, 762 F. Supp. 1503, 1508 (D.D.C. 1991), or where the defendant was liable for an admitted debt. *Federal Deposit Insurance Corp. v. Owen*, No. 5:91CV00389, U.S. Dist. LEXIS 12145 (D. Conn. April 27, 1992) . . .
>
> In the instant case, Plaintiff does not allege that Defendants made fraudulent transfers, that they defaulted on loan obligations to [the institution] or that they took excessive salary or bonuses or in any way benefited economically from their alleged negligence, gross negligence

> or breach of fiduciary duty. Plaintiff does not cite any authority for the proposition that § 1821(d)(18) authorizes the Court to require an accounting or to impose an asset freeze in the absence of such allegations. Nor does the Court's independent research uncover any such authority. Accordingly, the Court will dismiss . . . for failure to state a claim.

829 F. Supp. at 1102-1103.

The FDIC attempts to distinguish *Gershman* by claiming that in that case "the RTC did not allege that the defendant [sic] benefited in any way from the alleged wrongdoing." (Opposition, p. 7, fn. 2.) However, the two cases cannot be distinguished. The vast bulk of the approximately $14 million in damages being sought by the FDIC relates to loans made by the seized bank to third parties wholly unrelated to any defendant. Defendants are being sued as members of the directors' loan committee for alleged negligence in having approved the decisions made by bank officers (none of whom have been sued) to grant these loans, not for having profited from them. Moreover, while there are some allegations of loans having been made to defendants or allegedly related entities, most of these transactions have also been the subject of separate civil proceedings, which were finally settled after the FDIC initially refused to accept payment. In short, most of the alleged damages still asserted in this lawsuit have nothing to do with allegations of any personal profit or benefit on the part of defendants. Thus, *Gershman*, like *Floyd*, is directly on point and holds that Section 18 would not authorize an asset freeze in such situations.

See also National Credit Union Administration Board v. Concord Limousine, Inc., 872 F. Supp. 1174 (E.D.N.Y. 1995), in which the district court relied on *Floyd, supra*, in denying a motion for a preliminary injunction to prevent the defendants, who were guarantors of an obligation owing to the plaintiff, from dissipating their assets pending suit.

Based upon the overwhelming weight of authority, the district court twice refused to grant the requested injunction, but then changed its mind suddenly on the third application even though no new facts or cases had been cited to the court.

In summary, numerous cases in circuits other than the Ninth Circuit have addressed the issue of whether Sections 18 and 19 authorize the entry of a preliminary injunction freezing a defendant's assets absent a showing of fraudulent conduct, fraudulent conveyances, or criminal conduct. Uniformly such cases have held that fraudulent or criminal conduct is required before an injunction may issue pursuant to those statutes. To petitioners' knowledge, the instant case is the first case which has held that such conduct is not required. Accordingly, there is a direct conflict in the cases and among the circuits on this issue. If the Court does not grant this Petition, petitioners respectfully contend that this conflict will remain unresolved and that the ruling of the Ninth Circuit will render the law muddy and confused on this issue of crucial importance to the banking community.

Moreover, substantial policy reasons exist for granting the Petition. Prior to the decision of the court of appeals in this case ("the appellate decision"), the law was clear that an injunction could not be granted under

Sections 18 and 19 unless the case involved allegations of intentional wrongful conduct extending well beyond mere negligence or the failure to repay a loan. However, the appellate decision, relying on the purported "plain words" of the statutes, would now permit the FDIC to apply for and receive an injunction freezing all of the assets of a defendant pending trial in virtually any case, even a mere collection case.[1] This effectively eliminates any requirement of intentional wrongful conduct on the part of a defendant before such an injunction may be granted, and all of the debate contained in the cases cited above and in petitioners' opening brief will be rendered moot. The statutes contain no due process or fairness constraints. As the *Floyd* court feared, absent a showing of fraudulent conduct, "the statute operates to afford Draconian relief to the FDIC under everyday circumstances." 827 F. Supp. at 414. This case is truly an example of such "Draconian relief" and demonstrates that the *Floyd* court's fear was well-founded.

For all of the reasons set forth above and in the Petition, petitioners request that the Petition be granted.

Respectfully submitted,

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[1] To the extent that the instant case seeks merely to recover loans allegedly owed to the bank by defendants/petitioners, that is indeed what this case is – a mere collection case.